2016 FUND ASSEMBLY MANUAL

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FUND ASSEMBLY 2016

DOUBLETIME® USER FORUM

Danny Raghunandan, Fund Application Specialist,
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SPEAKER INFORMATION

DOUBLETIME® USER FORUM

Danny Raghunandan
Fund Application Specialist, Information Technology

Danny Raghunandan joined The Fund's staff in 2002 as a Data Entry Operator at the Central Florida Data Center. After learning the ATIDS system he spent a short time in the Mapping department before joining the Help Desk team at Fund Headquarters in 2003.

Danny's excellent technical and business knowledge allowed him to assist hundreds of our members and internal employees with their Fund applications and PC's as a Level 3 Rep. In 2014, Danny was promoted to Application Specialist for the eSolutions Integrations Group and now focuses his attention on DoubleTime® and all related software enhancements.

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FUND ASSEMBLY 2016

CLAIMS SKITS

A Presentation by The Fund's Claims Department

George Perez, Fund Claims Manager
Scott Jackson, Fund Claims Counsel

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SPEAKER INFORMATION

CLAIMS SKITS

George Perez
Fund Claims Manager

George Perez is Fund Claims Manager. He graduated from the University of Central Florida and Brooklyn Law School.

Prior to joining The Fund, Mr. Perez was in private practice where he was involved in transactional real estate for both residential and commercial properties, as well as representing institutional lenders. He was also a real estate and title insurance litigator representing a number of title insurance underwriters. During his years of private practice, Mr. Perez was also involved in estate planning/probate and trust administration as well as business law.

He has taught in Valencia College's ABA accredited paralegal studies program in addition to being a regular speaker at The Fund's New Member Training program. Mr. Perez is a member of The Florida Bar.

Scott D. Jackson
Fund Underwriting Counsel

Scott D. Jackson a native of Miami, is an Underwriting Counsel with Attorneys' Title Fund Services.

Mr. Jackson holds a Bachelor of Science degree in Social Studies Education from Florida International University, a Master of Library Science degree from Florida State University, and a Juris Doctor degree from the University of Miami School of Law. He has over thirteen years of experience handling both claims and underwriting issues, mostly with The Fund. Mr. Jackson has also been actively involved in New Member Training for The Fund and with both Fund Assembly and the Affiliate Assemblies. He believes that education is an ongoing process that should never be considered complete.

TN 3.01.03 Access Checklist (12/95)

Although an owner may be able to access the land, this does not necessarily mean that there is a legal right to do so. The following checklist should assist the Fund Member in determining whether there is legal access to and from the insured land.

1. **Plat:** Does the plat show the roads on the plat tying into the public road system? Does the plat contain an offer to dedicate and was the dedication accepted? **TN 3.02.02 D.**

2. **Survey:** Does the survey show the land abutting a public road?

3. **Unpaved Road:** If the land is on an unpaved road, the Fund Member should determine who owns it, whether it has been dedicated to the public, or whether the insured has a private easement. **TN 3.02.01**; **TN 3.02.02 E.1**.

4. **Governmental Maps:** If there is a public road, it should show on county or state right-of-way maps. **TN 3.02.01**; **TN 3.02.02 E.1**.

5. **Documents:** Do any of the conveyances in the chain of title provide for an easement or is there a separately recorded easement? **TN 3.02.03 A.**

6. **Limitations:** If there is a recorded easement does it contain limitations, such as what the easement can be used for and the number of people who can use it? If so, an exception should be placed in Schedule B for the limitations on the easement use.

7. **Gates:** Is it necessary to open a gate to access the property? If the gate is on the insured land it would not present a problem, but gates often open into access lanes that are not part of the land being insured.

8. **Inquiry of the Parties:** If the parties indicate that access to the property is over a lane that has not been searched, the Fund Member should do so.

9. **Unadjudicated Access:** For insuring purposes, unadjudicated access such as prescriptive easements, common law ways of necessity or statutory ways of necessity do not provide legal access until there is a court adjudication. **TN 3.02.03 B.**

10. **Railroad Crossings:** If a railroad crossing is being relied on for access to and from the insured land, Schedule B should specifically limit the access being insured to that provided in the crossing agreement. **TN 3.02.04.**

11. **Prior Policies:** The Fund Member should be careful in using older policies as a title base. Some of the older forms did not insure against lack of access. **TN 3.01.01.**

SC 3.02 Determination of Access

TN 3.02.01 Access to a Public Road

The right of access insured is the right of access to a public road. Before a title policy is issued, a determination should be made that the Land abuts a public road, access to which is not limited or restricted, or that there appears of record a private easement for access to the Land from a public road. Right-of-way maps for the four road systems are filed in the office of the clerk of the circuit court of the appropriate county. See Secs. 335.02 (2), 336.02 (1) (b) and 337.2735, F.S. Information is also available at the state, county or municipal levels.

TN 3.02.02 Public Roads (Rev. 12/05)

A. Statutory Definitions

The Florida Legislature has designated as public roads, "[a]ll roads which are open and available for use by the public and dedicated to the public use, according to law or by prescription, are hereby declared to be, and are established as, public roads." See Sec. 335.01, F.S. Florida public roads are divided into four systems by Sec. 335.01, F.S., as follows:

a) The state highway system,

b) The state park road system,

c) The county road system,

d) The city street system.

The state highway system, the state park road system, the county road system and the city street system are defined in Sec. 334.03, F.S.

B. Limited and Controlled Access

In addition to major limited access roads where abutting owners have no access or only limited access, such as the Florida Turnpike and I-10, there are many less significant controlled access roads where abutting owners have access only at such points and in such manner as determined by the governmental authority. Even on roads with seemingly low traffic volume, there may be no access onto a certain road, particularly at intersections, in order to protect the public's safety.

Unlike curb cuts, there may be notice of the governmental authority's acquisition of such roads, either by condemnation proceedings or by a deed from the grantor conveying a portion of his property to be used as a road.

C. Curb Cuts

Unlike limited and controlled access, there is usually no recorded notice of city and county ordinances or regulations governing the frequency of curb cuts to a public road. The denial of a curb cut permit could render access to the insured land impracticable. See **TN 3.05.01**. There is no policy coverage for the denial of a curb cut. It is excluded from coverage by Exclusion 1, usually referred to as the governmental regulation exclusion. The insured or his attorney is responsible for determining how such governmental regulations affect the insured's interests.

D. Platted Roads

In the case of platted property, a determination should be made of a dedication of the road for public use and that the dedication has been either formally accepted or accepted by construction and use of the road.

After September 1, 1971, "all streets, alleys, easements, rights-of-way, and public areas shown on such plat, unless otherwise stated, shall be deemed to have been dedicated to the public for the uses and purposes thereon stated" when the plat has been formally accepted or approved by the governing body and properly recorded. Sec. 177.081 (3), F.S.

The opening and use of one street dedicated by plat may be acceptance of the dedication of all the streets on the plat. See **TN 24.01.01**.

If a plat indicates a private easement, public use may not be assumed. Rather, the indication of a private easement in a plat implies just the opposite — some restriction as to

access. See *Wolfson v. Heins*, 6 So.2d 858 (Fla. 1942), cited in **TN 3.03.01**, for a case involving a private street shown on a plat.

E. Nondedicated Public Roads

1. Filing of Map and Certificate

Sec. 95.361(3), F.S., provides that the filing of a map in the office of the circuit court of the county where the road is located, showing the lands and reciting on it that the road has vested in the state or county or municipality duly certified by the Secretary of the Department of Transportation, or the chairman and clerk of the board of county commissioners, or the mayor and clerk of the municipality is prima facie evidence of ownership of the land by the state, county or municipality as the case may be. *Hudson Farms Citrus & Cattle v. DeSoto Co.*, 456 So.2d 511 (Fla. 2d DCA 1984). For issuing a title policy, the recorded map and certificate can be relied on for determining that a road is a public road.

2. Roads Constructed and Maintained by Governmental Authority

Access to Brownacre is by a dirt road winding through an adjacent forest down to a public highway. No dedication such as by deed, order of taking or map pursuant to Sec. 95.361(3), F.S., for the road can be located. May access to the property be insured?

No, unless (A) an affidavit by the county engineer is obtained and recorded stating that the road has been constructed and maintained continuously and uninterruptedly for four years by the county and (B) a survey shows that the land to be insured abuts the road.

Sec. 95.361 (1), F.S., provides that a road constructed and maintained continuously for four years by the county or municipality or by the Department of Transportation is deemed to be dedicated to the public, said dedication vesting title in the county if the road is a county road, in a municipality if it is a municipal street, or in the state if it is a road in the state highway system or park road system. See, among others, *Lovey v. Escambia County,* 141 So.2d 761 (Fla. 1st DCA 1962).

The road does not need to be paved with concrete or asphalt to qualify as a public road under the statute. *Pasco County v. Johnson,* 67 So.2d 639 (Fla. 1953); *St. Joe Paper Co. v. St. Johns County*, 383 So.2d 915 (Fla. 5th DCA 1980). It may be a dirt road. *Lee v. Calhoun County*, 532 So.2d 43 (Fla. 1st DCA 1988).

A road privately constructed but governmentally maintained is not a public road under Sec. 95.361(1), F.S. *Balbier v. City of Deerfield Beach*, 408 So.2d 764 (Fla. 4th DCA 1982); *Osceola County v. Castelli*, 435 So.2d 417 (Fla. 5th DCA 1983); *St. Joe Paper Co. v. St. Johns County*, 383 So.2d 915 (Fla. 5th DCA 1980).

See also **TN 24.01.02**.

3. Roads Maintained by Governmental Authority

Same facts as in 2) above, but there is no evidence of who constructed the road as required by Sec. 95.361(1), F.S. May access to the property be insured?

No, unless (A) an affidavit by the county engineer is obtained and recorded stating that the road has been regularly maintained or repaired for the immediate past seven years by the county and that there is no known contest as to the road being public and (B) a survey shows that the land to be insured abuts the road.

Effective July 14, 2003, Sec. 95.361(2), F.S., provides a presumed dedication upon the passage of seven years of regular maintenance and repair by a governmental entity, regardless of who (private or public entity) constructed the road. Persons claiming an interest in the lands affected by Sec. 95.361(2), F.S., were given one year from the effective date to file a claim opposing the presumed dedication. Sec. 95.361(4), F.S.

Provided that there was no litigation during the one-year period expiring July 14, 2004, Sec. 95.361(2), F.S., may be relied on to insure access.

See also **TN 24.01.02**.

F. Public Prescriptive Easements

May a public road based solely on prescription be relied on as access?

No, unless its status as a public road and its extent as an easement have been judicially determined. The Fund Member is responsible for ascertaining that the judicial determination contains an exact legal description of the easement so that it may be located from the official records alone without a physical examination of the land or the use of an unrecorded survey. See *Jones v. Orem*, 605 So.2d 1017 (Fla. 5th DCA 1992). An affidavit reciting facts tending to establish a public prescriptive easement may not be relied on for the purpose of insuring access. The examination of the status of the public road should include a determination that the road has not been vacated or relocated.

TN 3.02.04 Railroad Crossing Agreements and Other Licenses

A license is similar to an easement to the extent that it is a permit to use another's land. However, a license is not an interest in land; an easement is. Usually, a license is revocable at the licensor's will; an easement is not. Generally, a license is not assignable. *Seaboard Air Line Ry. Co. v. Dorsey*, 149 So. 759 (Fla. 1933); *Dotson v. Wolfe*, 391 So.2d 757 (Fla. 5th DCA 1980); 20 FLA. JUR.2d, Easements, Sec. 1, et seq.; and CLARK, SURVEYING AND BOUNDARIES (6th ed. 1992), Sec. 27.19.The most frequently encountered access license is the private railroad crossing agreement or license. If the Fund Member is using a prior policy, he must examine the license to determine if it is assignable. Usually, they are not. If the license is assignable, it is only with the written consent of the licensor. Whether the old license is assigned or a new license obtained, if the only access is by a private railroad crossing agreement or license, an appropriate exception must be made in the commitment and Schedule B of the policy to the effect that "Access is restricted to or by a private railroad crossing agreement or license recorded at O.R.B. ____Page ____, of the Public Records of _____ County, Florida." Since the policy does not insure the license but only access, the license should not be referred to in the legal description in Schedule A.

BOARDROOM OF

PURE EVIL, INC.

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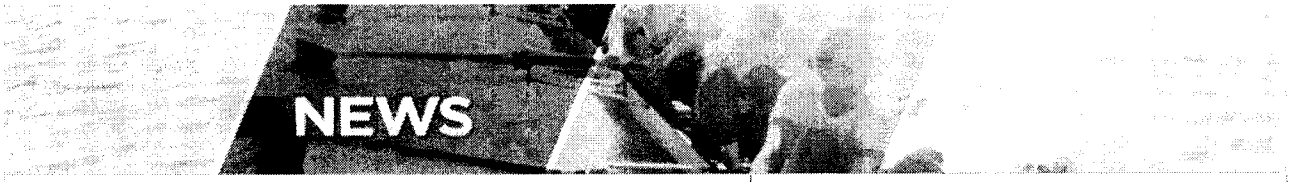

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EMAIL HACKERS UPDATE

Email hackers are changing wiring instructions in order to steal the seller's proceeds.

In September 2015, we published a Fund Alert warning of email hackers changing wiring instructions in order to steal the seller's proceeds. The hackers have upped their game, and are now intercepting emails from the sellers with the original wiring instructions, and changing the instructions to divert the proceeds to hacker's own account.

The emails appear valid, and appear to be from the seller in every way. The only way to protect yourself is to verify with the seller, by phone or in person, that the wiring instructions you have are correct.

While the hackers appear to be pretending to be sellers (because that's where the bulk of the money from any one transaction goes), be careful with all email correspondence. Do not trust an email from anyone when it comes to sending money from your trust account.

For more information, here is a link to the original September 2015 Fund Alert (/FooterMenu/News/Fund-Alert/Email-Hackers.aspx)regarding the email hackers.

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EMAIL HACKS

Hackers sending emails to the closing agent directing a change to the disbursement instructions.

Fund Members should be aware of a scam where hackers are able to hack into the email accounts of real estate brokers and others to get details of closing transactions. They then send emails directing a change to the disbursement instructions to the closing agent.

A Fund Member just reported that on Friday she sent an email to all of the parties in a transaction letting them know that it had closed and the funds had been disbursed. One of the parties could not attend the closing, so her email stated she would arrange for a time when he could pick up his check. Monday morning she received an email from him saying that it would be more convenient if she could wire the funds. She asked for his wiring instructions and they were provided. She was in the process of initiating the wire when she received a text message from the same person, asking when he could come by to pick up his check. She was confused and called him. He had never sent the email and the account the funds were to be wired to was not his account. If he had not sent the text message when he did, the funds would have been gone.

To prevent this from happening to you, we recommend you make sure you get good cell phone numbers for all parties to your transaction. If you get a change of instructions, especially having to do with money, from anyone, contact that party at the phone number you have, and verify that they actually changed their instructions. *Do not rely on instructions received by email, no matter how good the email looks, or how many specific details the email sender provides.* These hackers are good.

SOMETIMES THE TRUTH HURTS

mortgagees and arms length purchasers may be insured.

TN 10.03.09 Quitclaim Deed — Forgeries (12/02)

The Fund's claims experience indicates that quitclaim deeds should be treated with caution in insuring title. Perpetrators of frauds and forgeries frequently use quitclaim deeds, possibly to avoid having to pay documentary stamps. Any quitclaim deed in the chain of title less than a year old should be carefully examined. If the quitclaim deed has any of the following characteristics please obtain approval from a Fund Underwriting Counsel before insuring title.

1. The deed does not appear to be for one of the traditional purposes of quitclaim deeds, such as clearing defects, deed in lieu of foreclosure, dissolution, etc.
2. The deed is handwritten.
3. The deed does not show the scrivener.
4. The deed shows the grantee as the scrivener.
5. The deed is recorded several months after it was purportedly executed.
6. The acknowledgment is incomplete.
7. The property appraiser's records show an out of state address for the grantor but the deed was acknowledged in Florida.
8. The deed shows minimum documentary stamps.
9. The deed was given after the property had remained titled under the name of the Certificate holder for over one year.
10. Any other irregularity that calls into question the validity of the deed.

SC 10.04 Parties to Conveyances

TN 10.04.01 Death of One Joint Grantee Before Execution of Deed (Rev. 12/97)

1. At the time of a conveyance to A and B as Joint Tenants With Right of Survivorship, B was deceased. Although there are no Florida cases on this issue, 26A C.J.S., Deeds, Sec. 20, n. 32 states that. in case of a deed to two or more grantees as joint tenants, if one is incapable of taking, the estate passes to the other, citing *McCord v. Bright*, 87 N.E. 654 (Ind. 1909). A deed to Joint Tenants with Right of Survivorship may be relied upon to vest title in the surviving tenant. If all tenants are deceased at the time of the conveyance the deed may not be relied upon.

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TITLE NEWS

Article X, Section 4
Florida Constitution

SECTION 4. **Homestead; exemptions.—**

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Intestacy Statute

732.103 Share of other heirs.—The part of the intestate estate not passing to the surviving spouse under s. 732.102, or the entire intestate estate if there is no surviving spouse, descends as follows:

(1) To the descendants of the decedent.

(2) If there is no descendant, to the decedent's father and mother equally, or to the survivor of them.

(3) If there is none of the foregoing, to the decedent's brothers and sisters and the descendants of deceased brothers and sisters.

(4) If there is none of the foregoing, the estate shall be divided, one-half of which shall go to the decedent's paternal, and the other half to the decedent's maternal, kindred in the following order:

(a) To the grandfather and grandmother equally, or to the survivor of them.

(b) If there is no grandfather or grandmother, to uncles and aunts and descendants of deceased uncles and aunts of the decedent.

(c) If there is either no paternal kindred or no maternal kindred, the estate shall go to the other kindred who survive, in the order stated above.

(5) If there is no kindred of either part, the whole of the property shall go to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate.

(6) If none of the foregoing, and if any of the descendants of the decedent's great-grandparents were Holocaust victims as defined in s. 626.9543(3)(a), including such victims in countries cooperating with the discriminatory policies of Nazi Germany, then to the descendants of the great-grandparents. The court shall allow any such descendant to meet a reasonable, not unduly restrictive, standard of proof to substantiate his or her lineage. This subsection only applies to escheated property and shall cease to be effective for proceedings filed after December 31, 2004.

SC 18.04 Priority of Liens

TN 18.04.01 Mortgages, Purchase Money — Priority Over Judgment Previously Entered Against Mortgagor (Rev. 12/10)

A husband and wife purchased a subdivision lot. At the time of purchase they executed a mortgage to a federal savings and loan association to finance a portion of the purchase price. The deed and mortgage were recorded and the money escrowed pending a continuation of the abstract. The continuation revealed a previous judgment of record against the husband and wife and for that reason the federal savings and loan association has refused to disburse the funds. The question is whether a mortgagee policy can be issued to the federal savings and loan association without excepting the judgment.

The judgment is against the husband and wife and is a lien on property held by the entirety. See *Stanley v. Powers*, 166 So. 843 (Fla. 1936). Therefore, the problem involves a question of priority.

The Supreme Court of Florida has held that a true purchase money mortgage, executed as a part of the transaction wherein the property is conveyed to the mortgagor, is prior and superior in dignity to a judgment previously entered against the mortgagor. 32A FLA. JUR. 2d, Judgments and Decrees, Sec. 429; *Cheves v. First Nat. Bank*, 83 So. 870 (Fla. 1920); *Schilling v. Bank of Sulphur Springs*, 147 So. 218 (Fla. 1933); *Associates Discount Corporation v. Gomes*, 338 So.2d 552 (Fla. 3d DCA 1976). The chief reason on which that rule is based is that the vendor actually has a vendor's lien anyway and the mortgage merely evidences and implements that lien.

In *Sarmiento v. Stockton, Whatley, Davin & Co.*, 399 So.2d 1057 (Fla. 3d DCA 1981), relying on the above-cited cases, the court held that as long as the mortgage is executed in conjunction with the purchase and is given as security for a portion of the purchase price, it is a purchase money mortgage, although the money is advanced by a third party and the mortgage is executed in his favor.

Therefore, a mortgagee policy could be issued with the judgment shown as being subordinate to the mortgage provided the mortgage for the purchase price of the land is executed simultaneously with the execution of the deed transferring title, so that they form one transaction, and all of the loan proceeds are applied to the purchase price. A title policy should not be issued if the judgment creditor is actively pursuing the enforcement of the lien, because the underwriter would be subjected to the expense of defending the mortgagee's interest.

When a mortgage secures purchase money and additional sums, its status as a priority lien does not extend beyond the money advanced or paid in buying the property. In *Citibank Mortgage. v. Carteret Sav. Bank*, 612 So.2d 599 (Fla. 4th DCA 1992), *aff'd*, 632 So.2d 599 (Fla. 1994), the court held that a judgment lien is inferior and subordinate to the

subsequent purchase money mortgage only to the extent of the loan proceeds used to acquire the property and existing improvements. Therefore, when a loan will be used in part for purchase money and in part for other purposes, a mortgagee policy should contain exceptions for any existing claims or liens against the mortgagor.

A mortgage obtained by the contract vendee to pay off the balance of the purchase price may not be treated as a purchase money mortgage with priority over judgments against the mortgagors. See **TN 9.03.01**.

Judgment liens in favor of the United States preempt state law in that they have priority over any other liens, including purchase money mortgage liens, or an encumbrance which is perfected later in time. See 28 U.S.C. Sec. 3201(b). However, it may not be enforced against real property co-owned by a debtor and any other person to the extent allowed by the laws of the state where the property is located. See 28 U.S.C. Sec. 3010(a) and **TN 18.03.04**.

See **TN 30.02.06** for a discussion of federal tax lien and purchase money mortgage. See **TN 22.04.08** for a discussion of why a simultaneous mortgage should be excepted under Schedule B of an owner's policy.

SC 18.05 Satisfaction of Judgments

TN 18.05.01 By Attorney of Record (Rev. 12/10)

A. An action at law was brought by a natural parent as next friend for his minor son and a certified copy of the judgment was recorded against the record owner of real property. The judgment was satisfied by a satisfaction executed and recorded by the attorney for the plaintiff. The question is whether the satisfaction is sufficient.

The Fund's opinion is that the satisfaction is sufficient provided the attorney for the plaintiffs is in fact the attorney of record. See *Moye v. General Motors Corporation*, 77 So.2d 875 (Fla. 1955); *Garner v. I. E. Schilling Co.*, 174 So. 837 (Fla. 1937).

B. A judgment was entered against a seller and a certified copy was recorded which constitutes a lien upon the real property. The seller proposes to furnish an affidavit signed by the judgment creditor's attorney of record which identifies the attorney and the litigation involved and goes on to say that the affiant has no present knowledge of the whereabouts of his client, but further states that his records disclose that the judgment has been paid in full and the lien thereof discharged. The question is whether the affidavit is sufficient to issue a title policy without including an exception for the judgment.

An attorney of record may accept payment of a judgment and satisfy the judgment. 4 FLA. JUR.2d., Attorneys at Law, Sec. 315; *State v. City of Hialeah*, 177 So. 712 (Fla. 1937).

This authority would seem to apply only where the attorney has accepted full payment

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(2) The court shall order a part of the income to be released, if after a hearing the court finds that the amount of the sequestration is excessive or unreasonable or if the sequestration is for an amount larger than the sum of the liquidated or ascertainable amount of the debt and the amount of interest and costs likely to be taxed.

(3) The court shall dissolve the sequestration if the amount of the debt is unliquidated and unascertainable by calculation.

(h) PRESERVATION OF INCOME UNDER SEQUESTER.—If personal property in custody of the United States marshal under a writ of sequestration is not claimed, the court may make such order for its preservation or use as appears to be in the interest of the parties.

(i) JUDGMENT AND DISPOSITION OF SEQUESTERED INCOME.—

(1) JUDGMENT FOR THE UNITED STATES.—On entry of judgment for the United States, the court shall order the sequestered income to be applied to the satisfaction of the judgment.

(2) RESTORATION OF INCOME.—If the sequestration is vacated or if the judgment on the claim for the debt is for the person against whom the writ of sequestration is issued, the court shall order the income restored to the debtor.

(Added Pub. L. 101–647, title XXXVI, § 3611, Nov. 29, 1990, 104 Stat. 4946.)

SUBCHAPTER C—POSTJUDGMENT REMEDIES

Sec.
3201. Judgment liens.
3202. Enforcement of judgments.
3203. Execution.
3204. Installment payment order.
3205. Garnishment.
3206. Discharge.

§ 3201. Judgment liens

(a) CREATION.—A judgment in a civil action shall create a lien on all real property of a judgment debtor on filing a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of section 6323(f) of the Internal Revenue Code of 1986. A lien created under this paragraph is for the amount necessary to satisfy the judgment, including costs and interest.

(b) PRIORITY OF LIEN.—A lien created under subsection (a) shall have priority over any other lien or encumbrance which is perfected later in time.

(c) DURATION OF LIEN; RENEWAL.—(1) Except as provided in paragraph (2), a lien created under subsection (a) is effective, unless satisfied, for a period of 20 years.

(2) Such lien may be renewed for one additional period of 20 years upon filing a notice of renewal in the same manner as the judgment is filed and shall relate back to the date the judgment is filed if—

(A) the notice of renewal is filed before the expiration of the 20-year period to prevent the expiration of the lien; and

(B) the court approves the renewal of such lien under this paragraph.

(d) RELEASE OF JUDGMENT LIEN.—A judgment lien shall be released on the filing of a satisfaction of judgment or release of lien in the same manner as the judgment is filed to obtain the lien.

(e) EFFECT OF LIEN ON ELIGIBILITY FOR FEDERAL GRANTS, LOANS OR PROGRAMS.—A debtor who has a judgment lien against the debtor's property for a debt to the United States shall not be eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly by the United States or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied. The agency of the United States that is responsible for such grants and loans may promulgate regulations to allow for waiver of this restriction on eligibility for such grants, loans, and funds.

(f) SALE OF PROPERTY SUBJECT TO JUDGMENT LIEN.—(1) On proper application to a court, the court may order the United States to sell, in accordance with sections 2001 and 2002, any real property subject to a judgment lien in effect under this section.

(2) This subsection shall not preclude the United States from using an execution sale pursuant to section 3203(g) to sell real property subject to a judgment lien.

(Added Pub. L. 101–647, title XXXVI, § 3611, Nov. 29, 1990, 104 Stat. 4948.)

REFERENCES IN TEXT

Section 6323(f) of the Internal Revenue Code of 1986, referred to in subsec. (a), is classified to section 6323(f) of Title 26, Internal Revenue Code.

§ 3202. Enforcement of judgments

(a) ENFORCEMENT REMEDIES.—A judgment may be enforced by any of the remedies set forth in this subchapter. A court may issue other writs pursuant to section 1651 of title 28, United States Code, as necessary to support such remedies, subject to rule 81(b) of the Federal Rules of Civil Procedure.

(b) NOTICE.—On the commencement by the United States of an action or proceeding under this subchapter to obtain a remedy, the counsel for the United States shall prepare, and clerk of the court shall issue, a notice in substantially the following form:

"NOTICE

"You are hereby notified that this [property] is being taken by the United States Government, which has a court judgment in [case docket number and jurisdiction of court] of $[amount] for [reason of debt].

"In addition, you are hereby notified that there are exemptions under the law which may protect some of this property from being taken by the United States Government if [name of judgment debtor] can show that the exemptions apply. Below is a summary of the major exemptions which apply in most situations in the State of [State where property is located]:

"[A statement summarizing in plain and understandable English the election available with respect to such State under section 3014

Chapter 3 — Access

SC 3.01 Policies and Access

TN 3.01.01 Prior and Current Policies

All current commitments and Owner's and Loan policy forms include, among other insuring provisions, insurance against loss or damage by reason of lack of a right of access to and from the land. Many earlier commitments and policies did not. See **TN 25.01.03.**

TN 3.01.02 Fund Members Must Determine Access (Rev. 12/05)

The Fund Member is responsible for determining that a right of access exists as to the land being insured. If the Fund Member is using a prior policy as a base, the Member must determine whether the prior policy insured access. Unless otherwise indicated, a Fund Member may rely on a prior Owner's Policy for the existence of legal access as of the effective date of that policy, but not as of the current date. He may not rely on an OP, OG or MP without examining the policy jacket to ascertain if access was insured. Copies of jackets are not available from The Fund; only Schedules A and B were microfilmed.

TN 3.01.03 Access Checklist (12/95)

Although an owner may be able to access the land, this does not necessarily mean that there is a legal right to do so. The following checklist should assist the Fund Member in determining whether there is legal access to and from the insured land.

1. **Plat:** Does the plat show the roads on the plat tying into the public road system? Does the plat contain an offer to dedicate and was the dedication accepted? **TN 3.02.02 D.**
2. **Survey:** Does the survey show the land abutting a public road?
3. **Unpaved Road:** If the land is on an unpaved road, the Fund Member should determine who owns it, whether it has been dedicated to the public, or whether the insured has a private easement. **TN 3.02.01**; **TN 3.02.02 E.1.**
4. **Governmental Maps:** If there is a public road, it should show on county or state right-of-way maps. **TN 3.02.01**; **TN 3.02.02 E.1.**
5. **Documents:** Do any of the conveyances in the chain of title provide for an easement or is there a separately recorded easement? **TN 3.02.03 A.**
6. **Limitations:** If there is a recorded easement does it contain limitations, such as what the easement can be used for and the number of people who can use it? If

so, an exception should be placed in Schedule B for the limitations on the easement use.

7. **Gates:** Is it necessary to open a gate to access the property? If the gate is on the insured land it would not present a problem, but gates often open into access lanes that are not part of the land being insured.

8. **Inquiry of the Parties:** If the parties indicate that access to the property is over a lane that has not been searched, the Fund Member should do so.

9. **Unadjudicated Access:** For insuring purposes, unadjudicated access such as prescriptive easements, common law ways of necessity or statutory ways of necessity do not provide legal access until there is a court adjudication. **TN 3.02.03 B.**

10. **Railroad Crossings:** If a railroad crossing is being relied on for access to and from the insured land, Schedule B should specifically limit the access being insured to that provided in the crossing agreement. **TN 3.02.04.**

11. **Prior Policies:** The Fund Member should be careful in using older policies as a title base. Some of the older forms did not insure against lack of access. **TN 3.01.01.**

SC 3.02 Determination of Access

TN 3.02.01 Access to a Public Road

The right of access insured is the right of access to a public road. Before a title policy is issued, a determination should be made that the Land abuts a public road, access to which is not limited or restricted, or that there appears of record a private easement for access to the Land from a public road. Right-of-way maps for the four road systems are filed in the office of the clerk of the circuit court of the appropriate county. See Secs. 335.02 (2), 336.02 (1) (b) and 337.2735, F.S. Information is also available at the state, county or municipal levels.

TN 3.02.02 Public Roads (Rev. 12/05)

A. Statutory Definitions

The Florida Legislature has designated as public roads, "[a]ll roads which are open and available for use by the public and dedicated to the public use, according to law or by prescription, are hereby declared to be, and are established as, public roads." See Sec. 335.01, F.S. Florida public roads are divided into four systems by Sec. 335.01, F.S., as follows:

AMAZING ACCESS

Back to Speaker Topics

FUND ASSEMBLY 2016
WELCOME REMARKS

Jimmy Jones, Fund President and Chief Executive Officer

Back to Speaker Topics

SPEAKER INFORMATION

WELCOME REMARKS

Jimmy Jones
Fund President and Chief Executive Officer

Jimmy R. Jones is President and CEO of Attorneys' Title Fund Services, LLC (The Fund). Prior to joining The Fund in 1988, he worked as an Audit Manager for a large, regional CPA firm, serving a number of Central Florida clients, including The Fund.

Since joining The Fund, Mr. Jones has been involved in a number of industry and business boards and committees. He has represented The Fund at both the National and State level, interacting with both leaders in the title insurance industry as well as the various professional groups that serve the industry. Since becoming a member of the Senior Management Team of The Fund, Mr. Jones served as CFO before becoming President and CEO. He has worked with industry leaders, regulators and business professionals, and has spent considerable time traveling the State and listening to Fund Members in order to develop the strategic direction of The Fund.

Mr. Jones has been married to his wife, Brenda for forty years. They have three adult children and two grand-daughters. He enjoys the mountains of North Carolina, playing guitar and spending time with his family.

Back to Speaker Topics

FUND ASSEMBLY 2016

ECONOMIC FORECAST FOR THE FLORIDA REAL ESTATE ATTORNEY

Sean Snaith, Ph.D., Director, Institute for Economic Competitiveness,
College of Business Administration, University of Central Florida

Back to Speaker Topics

SPEAKER INFORMATION

ECONOMIC FORECAST FOR THE FLORIDA REAL ESTATE ATTORNEY

Sean Snaith, Ph.D.
Director, Institute for Economic Competitveness, College of Business Administration, University of Central Florida

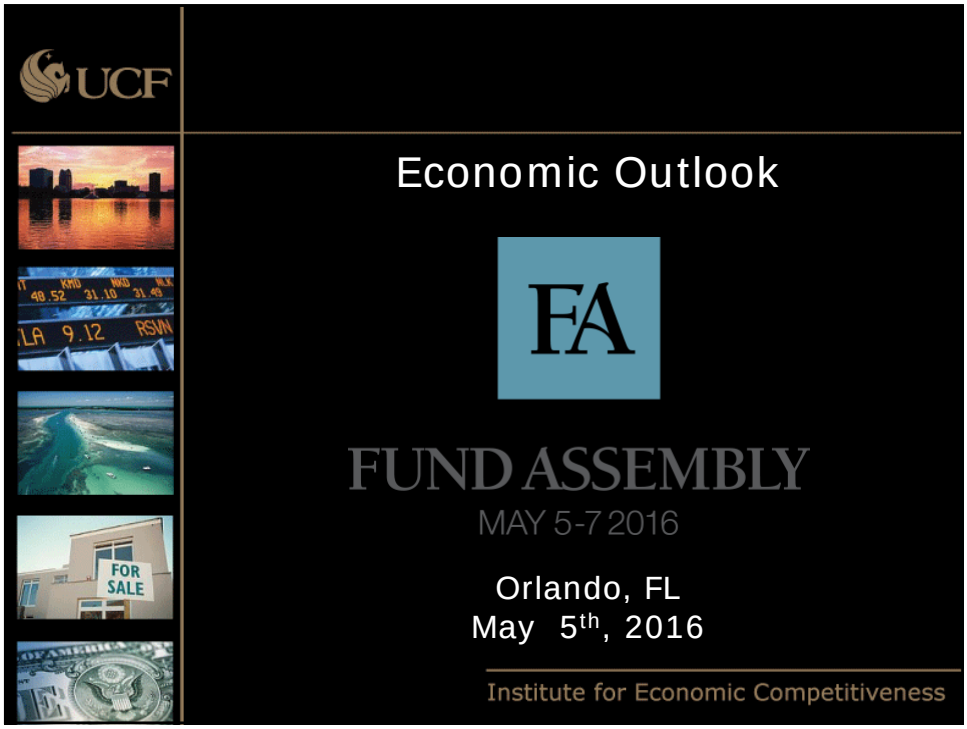
Dr. Sean Snaith is the director of the University of Central Florida's Institute for Economic Competitiveness and a nationally recognized economist in the field of business and economic forecasting. He has served as a consultant for local governments and multi-national corporations such as Compaq, Dell and IBM. Dr. Snaith frequently is interviewed in national and regional media and is a sought-after speaker.

He has been quoted in *The Wall Street Journal, USA Today, The New York Times, The Economist* and *CNNMoney.com* and has appeared on CNBC, Fox Business Network and Business News Network.

Dr. Snaith is a member of several economic organizations and national economic forecasting panels, including *The Wall Street Journal*'s Economic Forecasting Survey, the Associated Press' Economy Survey, CNNMoney.com's Survey of Leading Economists, *USA Today*'s Survey of Top Economists, Federal Reserve Bank of Philadelphia's Survey of Professional Forecasters, Bloomberg and Reuters.

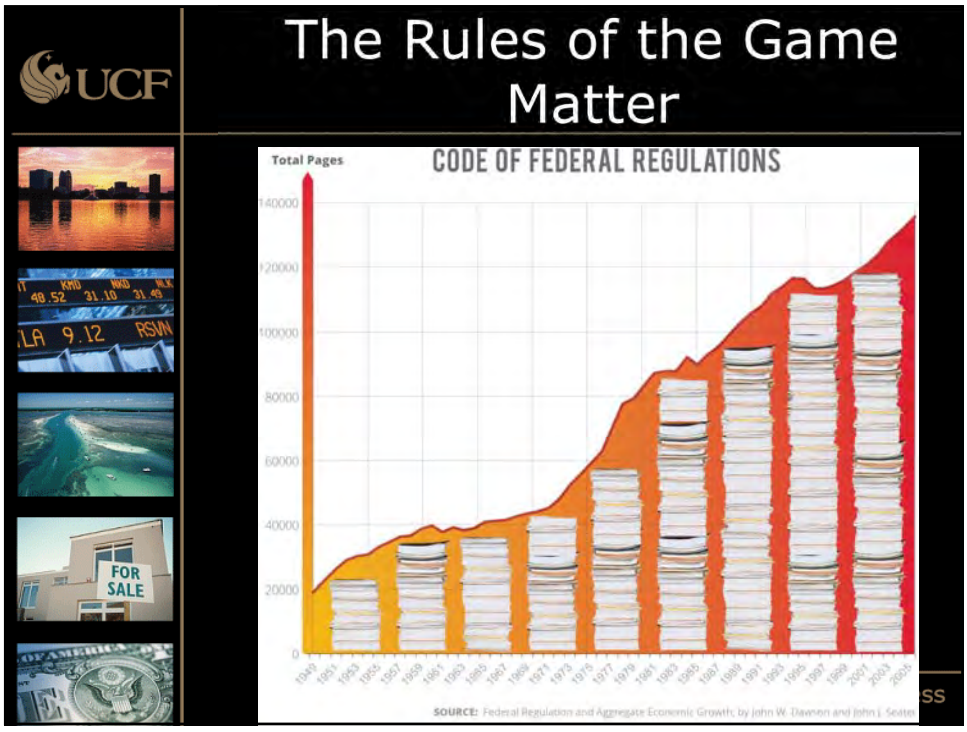
He was named by Bloomberg News as one of the nation's most accurate forecasters in 2008. In 2007, Dr. Snaith was named California's most accurate forecaster by the Western Blue Chip Consensus Forecast.

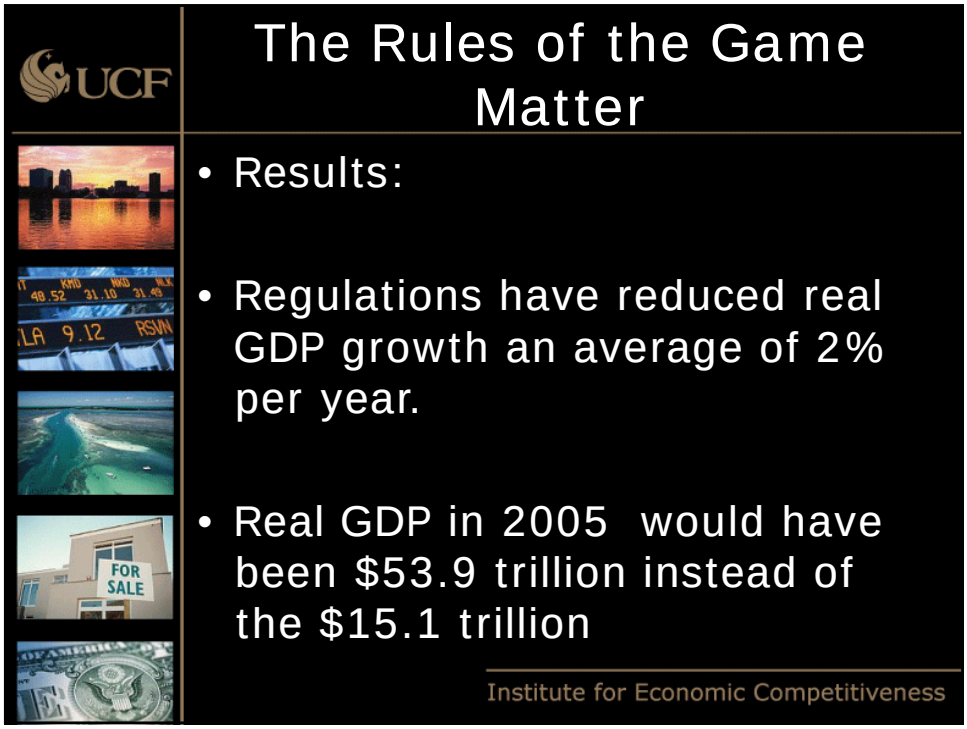
He holds a B.S. degree in Economics from Allegheny College and M.A. and Ph.D. degrees in Economics from Pennsylvania State University. Dr. Snaith is also the host of "Money Clips with Sean Snaith," a weekly segment produced by UCF TV, which aims to break down complex issues into digestible news about subjects ranging from the job market and housing to the cost of food.

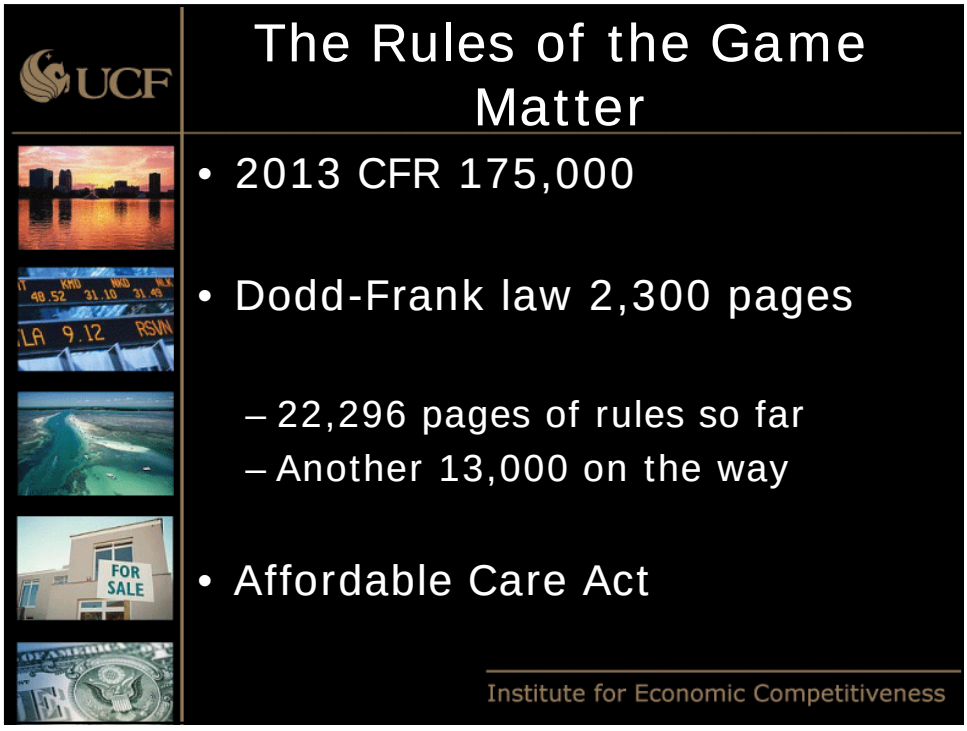

UCF
Economic Outlook
FA
FUND ASSEMBLY
MAY 5-7 2016
Orlando, FL
May 5th, 2016
Institute for Economic Competitiveness

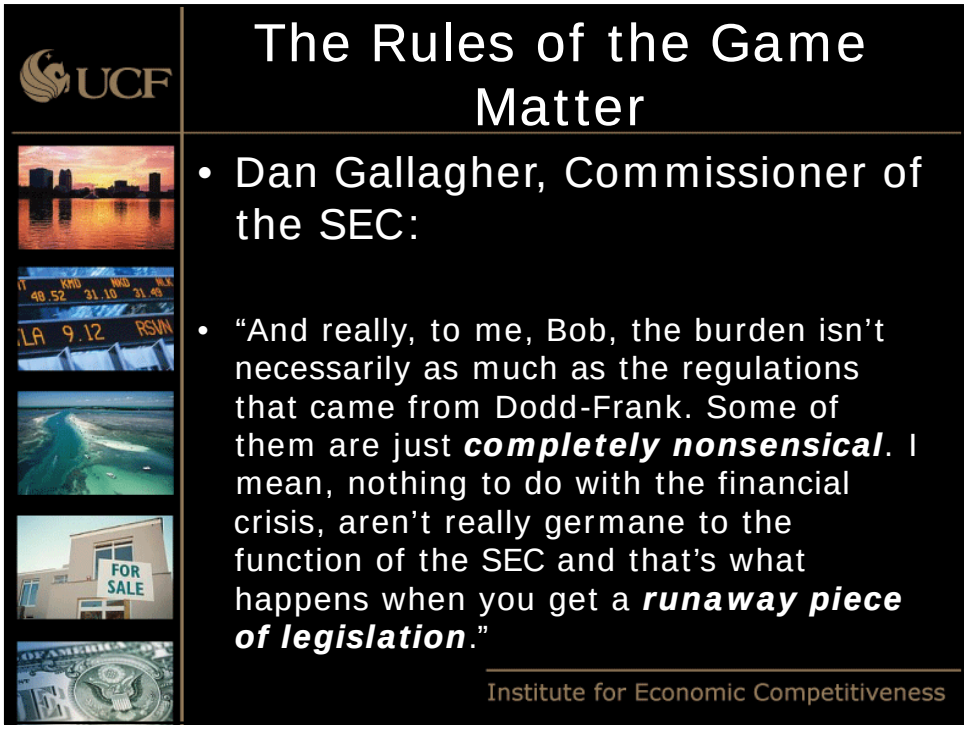
UCF
The Rules of the Game Matter
They change the way the players play the game.
They can change the outcome of the game itself.
Freeze tag
Institute for Economic Competitiveness

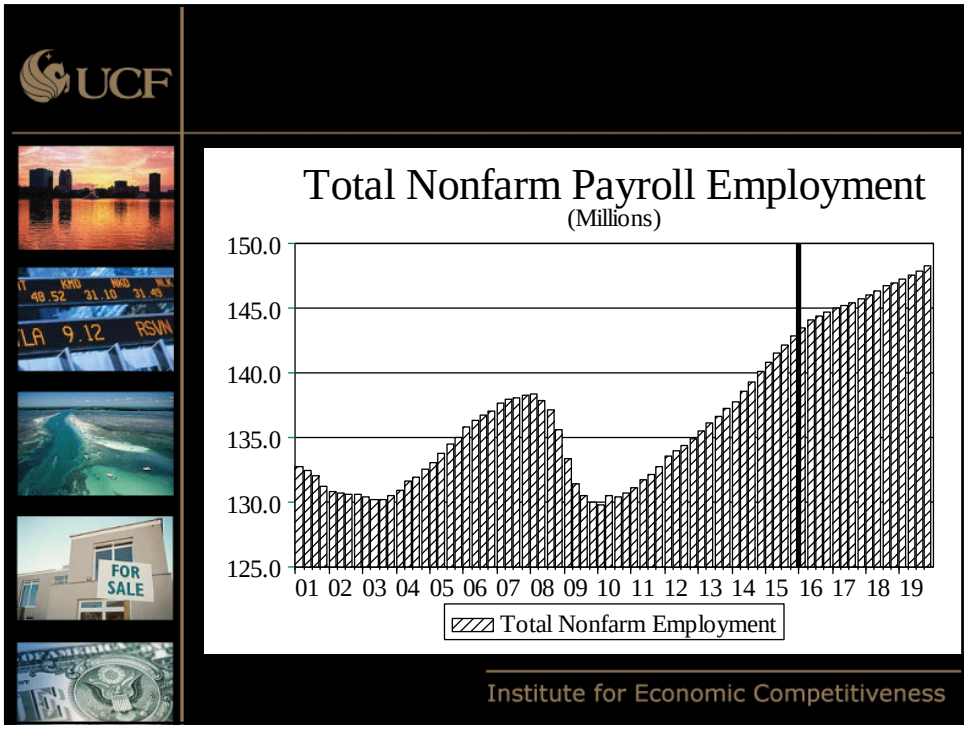
UCF
The Rules of the Game Matter
• Federal Regulation and Aggregate Economic Growth
by John W. Dawson and John J. Seater
• Journal of Economic Growth (2013) 18:137-177
Examined Economic Growth and Productivity 1949-2005
Institute for Economic Competitiveness
FOR SALE

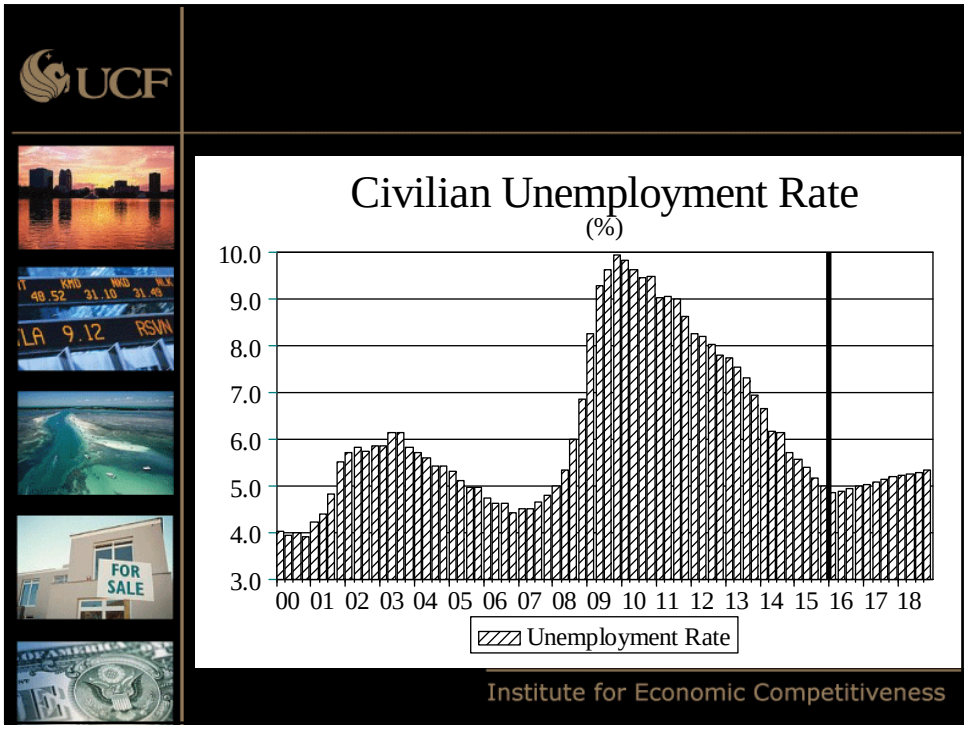

UCF
The Rules of the Game Matter
Total Pages
CODE OF FEDERAL REGULATIONS
FOR SALE


UCF
The Rules of the Game Matter
• Results:
• Regulations have reduced real GDP growth an average of 2% per year.
• Real GDP in 2005 would have been $53.9 trillion instead of the $15.1 trillion
FOR SALE
Institute for Economic Competitiveness


UCF
The Rules of the Game Matter
• 2013 CFR 175,000
• Dodd-Frank law 2,300 pages
– 22,296 pages of rules so far
– Another 13,000 on the way
• Affordable Care Act
FOR SALE
Institute for Economic Competitiveness


UCF
The Rules of the Game Matter
• Dan Gallagher, Commissioner of the SEC:
• "And really, to me, Bob, the burden isn't necessarily as much as the regulations that came from Dodd-Frank. Some of them are just ***completely nonsensical***. I mean, nothing to do with the financial crisis, aren't really germane to the function of the SEC and that's what happens when you get a ***runaway piece of legislation***."
FOR SALE
Institute for Economic Competitiveness

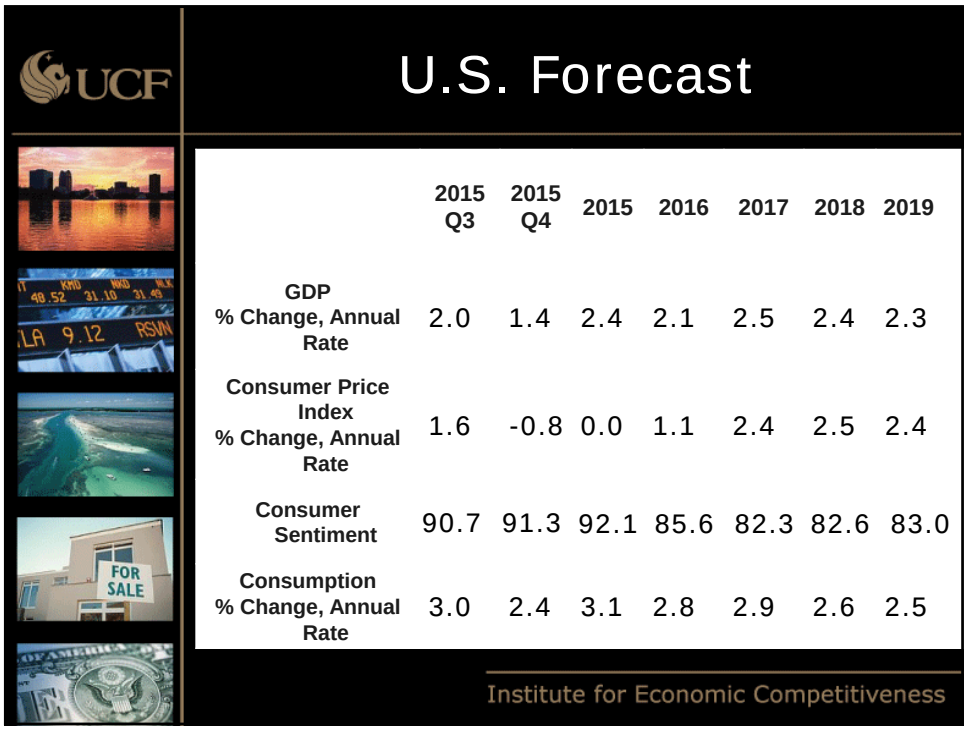

UCF
Total Nonfarm Payroll Employment
(Millions)
150.0
145.0
140.0
135.0
130.0
125.0
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
Total Nonfarm Employment
FOR SALE
Institute for Economic Competitiveness


UCF
Civilian Unemployment Rate
(%)
10.0
9.0
8.0
7.0
6.0
5.0
4.0
3.0
00 01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18
Unemployment Rate
Institute for Economic Competitiveness

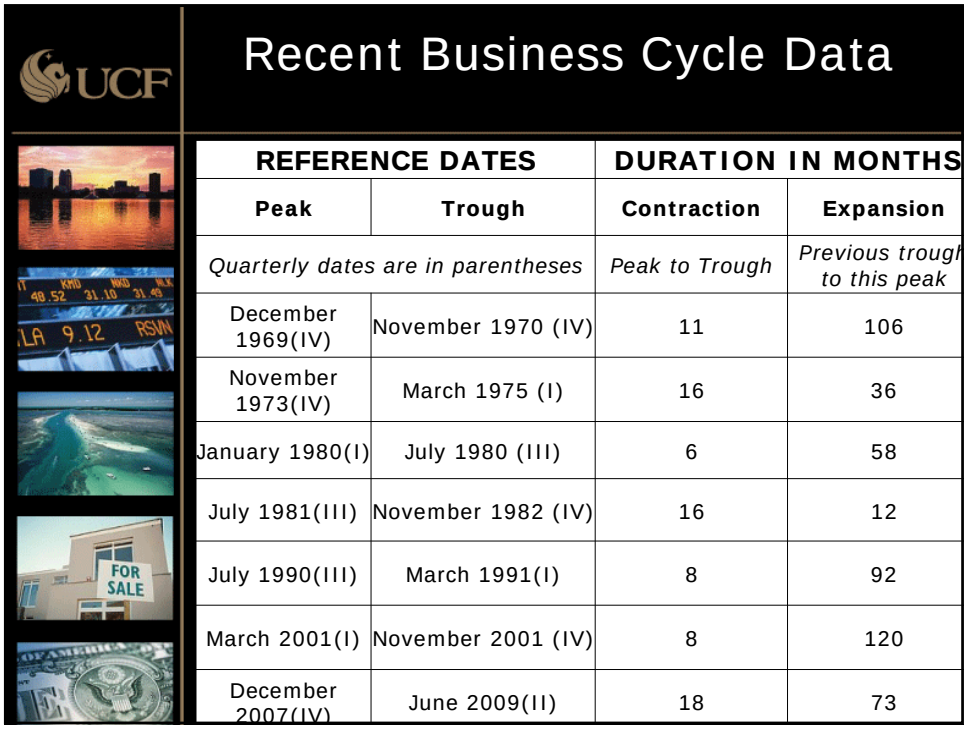
UCF
Global Factors - China
Is the Chinese economy a pagoda of cards?
Economy slowing
Stock market plunge (again)
Desperate attempts to stop the decline
Depreciation of the Yuan
Institute for Economic Competitiveness

UCF
Global Factors - ROW
IMF revised down 2015 and 2016 world growth outlook
2015: 3.1%, 2016: 3.6%
Advanced economies
2015: 2.0%, 2016: 2.2%
Latin America/Caribbean sub 2% outlook
China continues to slow
FOR SALE
Institute for Economic Competitiveness

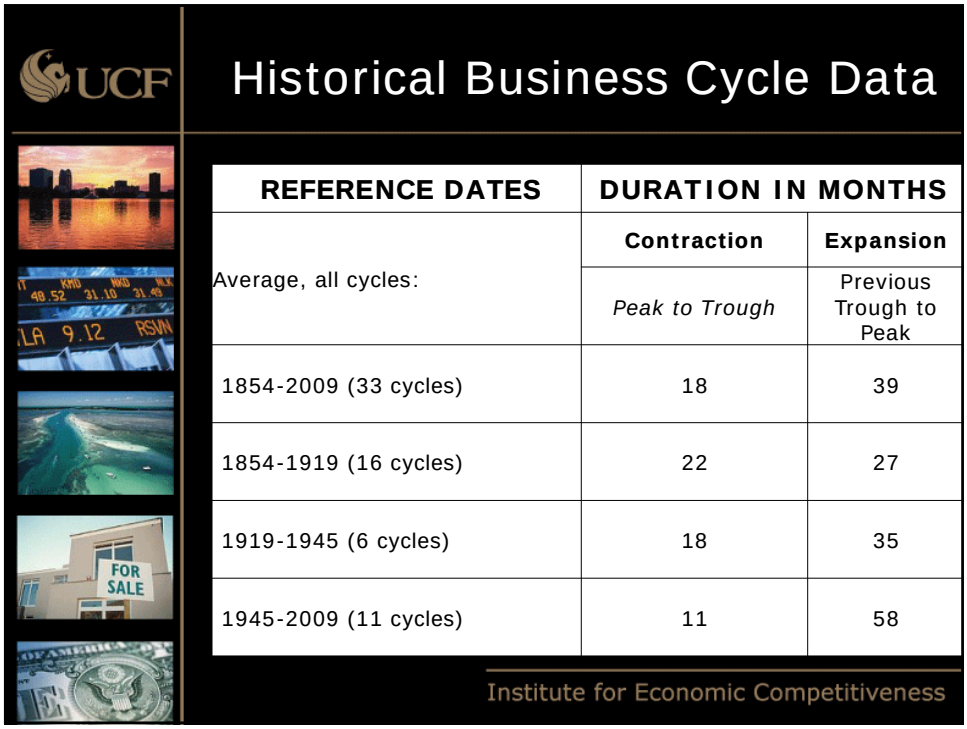
UCF
Global Factors - ROW
Brazil – worst recession in 100+ years
Canadian recession 1st half 2015
Much stronger U.S. Dollar
U.S. Dollar up nearly 55% against the Brazilian Real over the past year
U.S. Dollar up more than 21% against the Canadian Dollar over the past year
FOR SALE
Institute for Economic Competitiveness



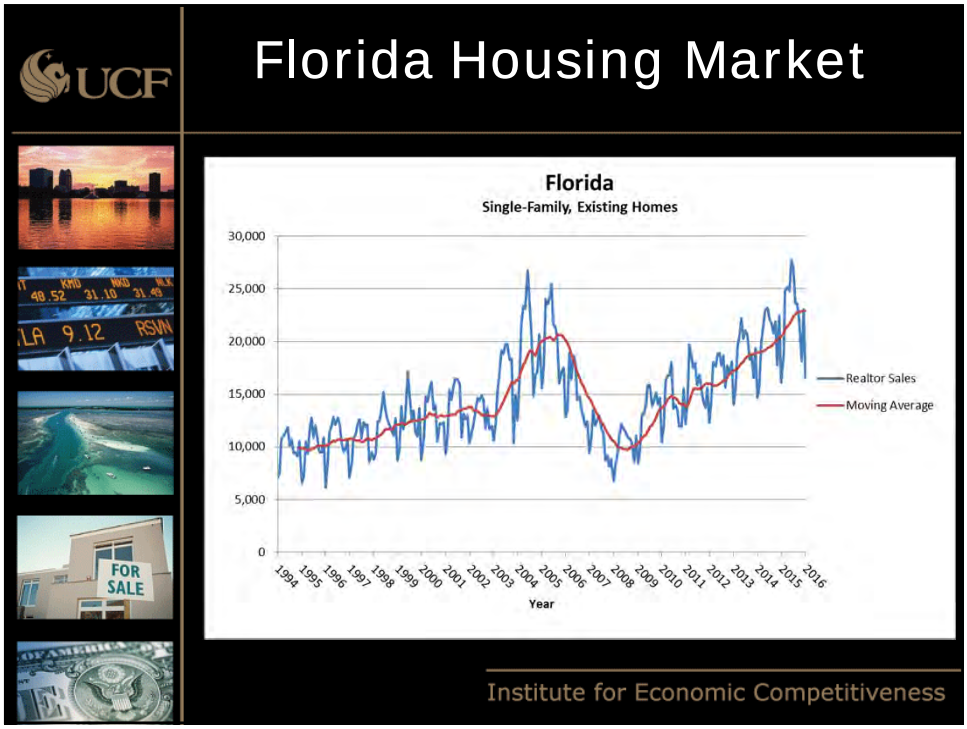
	2015 Q3	2015 Q4	2015	2016	2017	2018	2019
GDP % Change, Annual Rate	2.0	1.4	2.4	2.1	2.5	2.4	2.3
Consumer Price Index % Change, Annual Rate	1.6	-0.8	0.0	1.1	2.4	2.5	2.4
Consumer Sentiment	90.7	91.3	92.1	85.6	82.3	82.6	83.0
Consumption % Change, Annual Rate	3.0	2.4	3.1	2.8	2.9	2.6	2.5

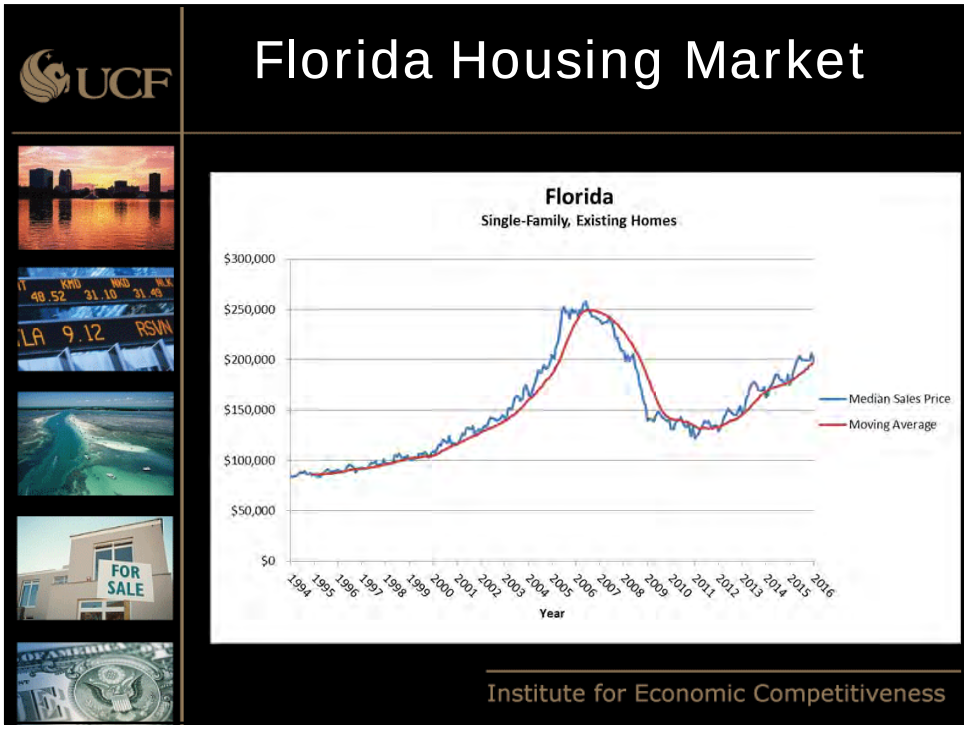


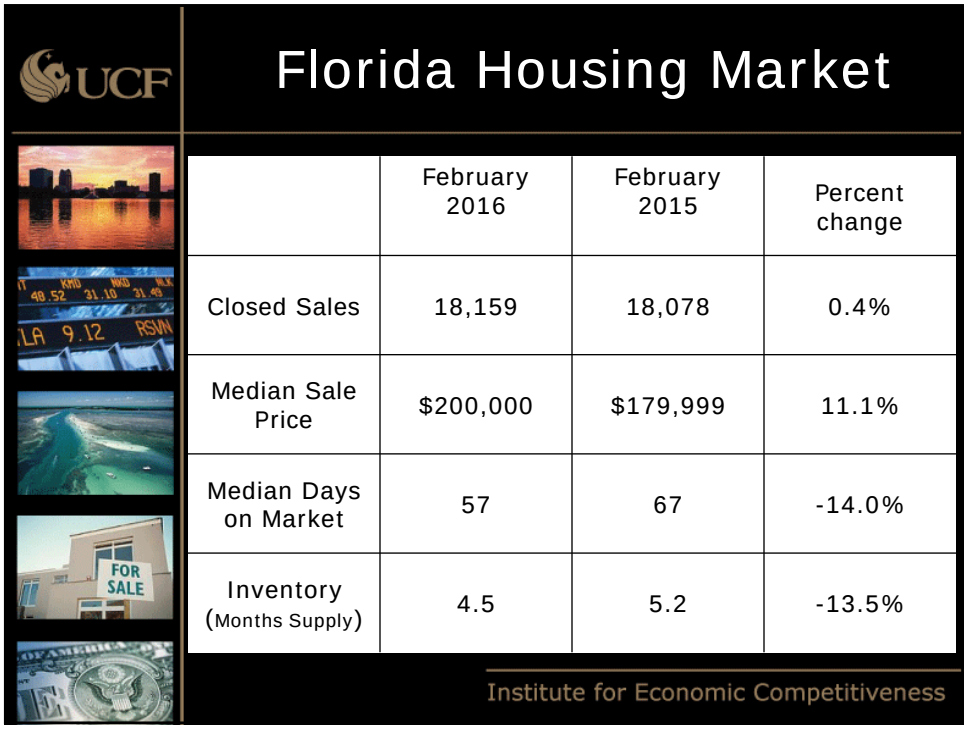
REFERENCE DATES		DURATION IN MONTHS	
Peak	Trough	Contraction	Expansion
Quarterly dates are in parentheses		*Peak to Trough*	*Previous trough to this peak*
December 1969(IV)	November 1970 (IV)	11	106
November 1973(IV)	March 1975 (I)	16	36
January 1980(I)	July 1980 (III)	6	58
July 1981(III)	November 1982 (IV)	16	12
July 1990(III)	March 1991(I)	8	92
March 2001(I)	November 2001 (IV)	8	120
December 2007(IV)	June 2009(II)	18	73


UCF
Historical Business Cycle Data
REFERENCE DATES
DURATION IN MONTHS
Contraction
Expansion
Average, all cycles:
Peak to Trough
Previous Trough to Peak
1854-2009 (33 cycles) 18 39
1854-1919 (16 cycles) 22 27
1919-1945 (6 cycles) 18 35
1945-2009 (11 cycles) 11 58
Institute for Economic Competitiveness

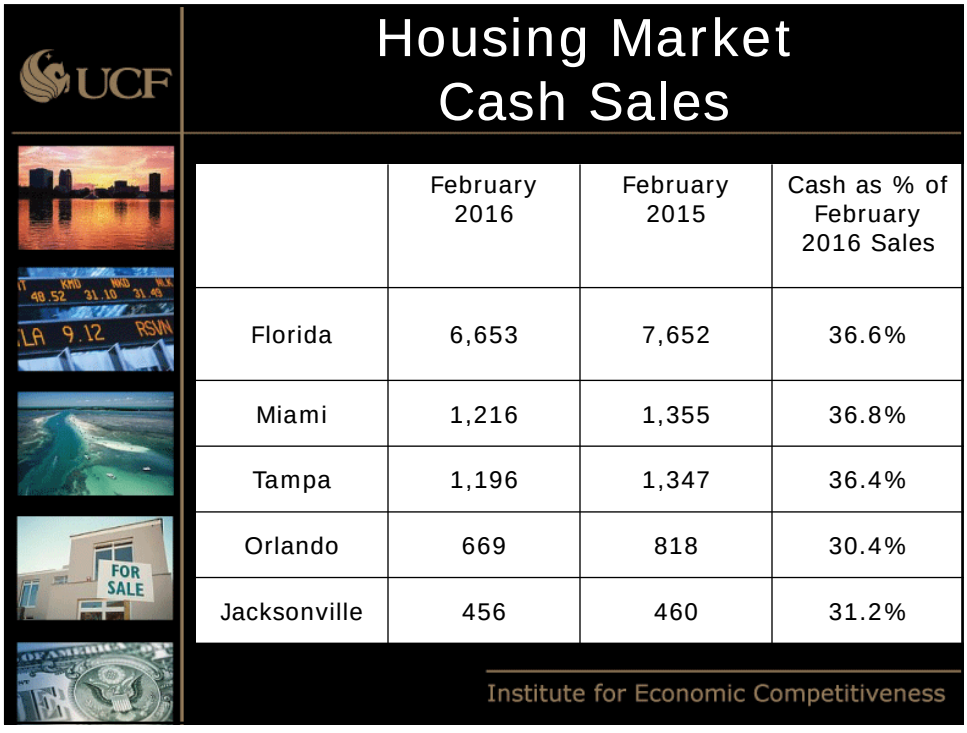
UCF
Florida Housing Market
Housing market recovery continues
Double-digit price appreciation has returned
Investors chasing shrinking pool of distressed properties
Housing finance still an issue
Institute for Economic Competitiveness


UCF
Florida Housing Market
Florida
Single-Family, Existing Homes
30,000
25,000
20,000
15,000
10,000
5,000
0
1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016
Year
Realtor Sales
Moving Average
FOR SALE
Institute for Economic Competitiveness

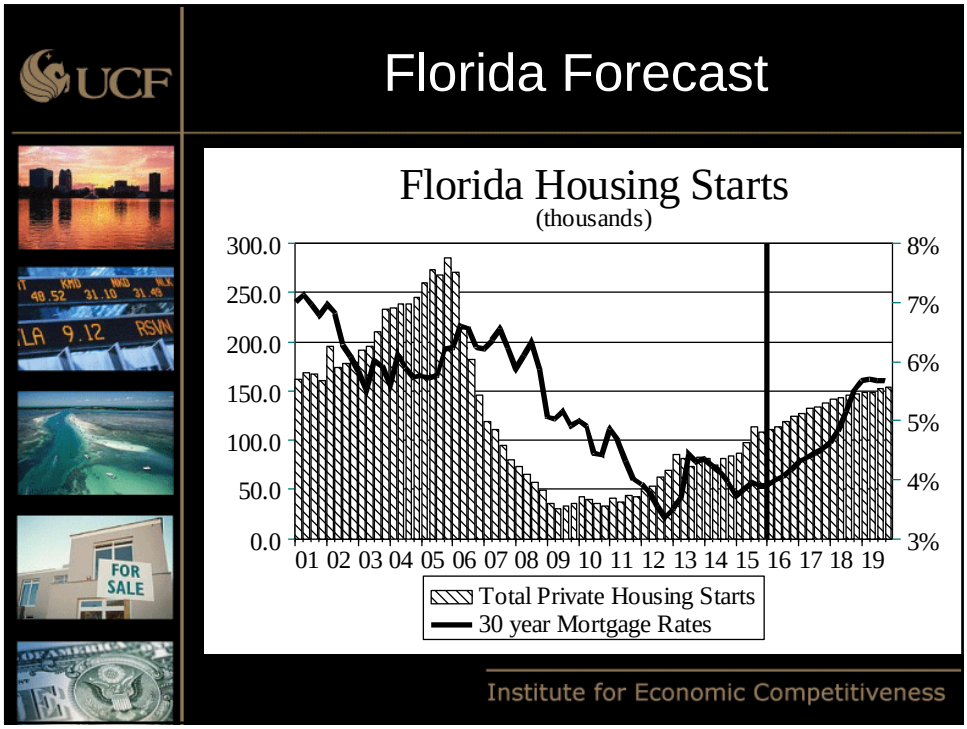

UCF
Florida Housing Market
Florida
Single-Family, Existing Homes
$300,000
$250,000
$200,000
$150,000
$100,000
$50,000
$0
1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016
Year
Median Sales Price
Moving Average
FOR SALE
Institute for Economic Competitiveness

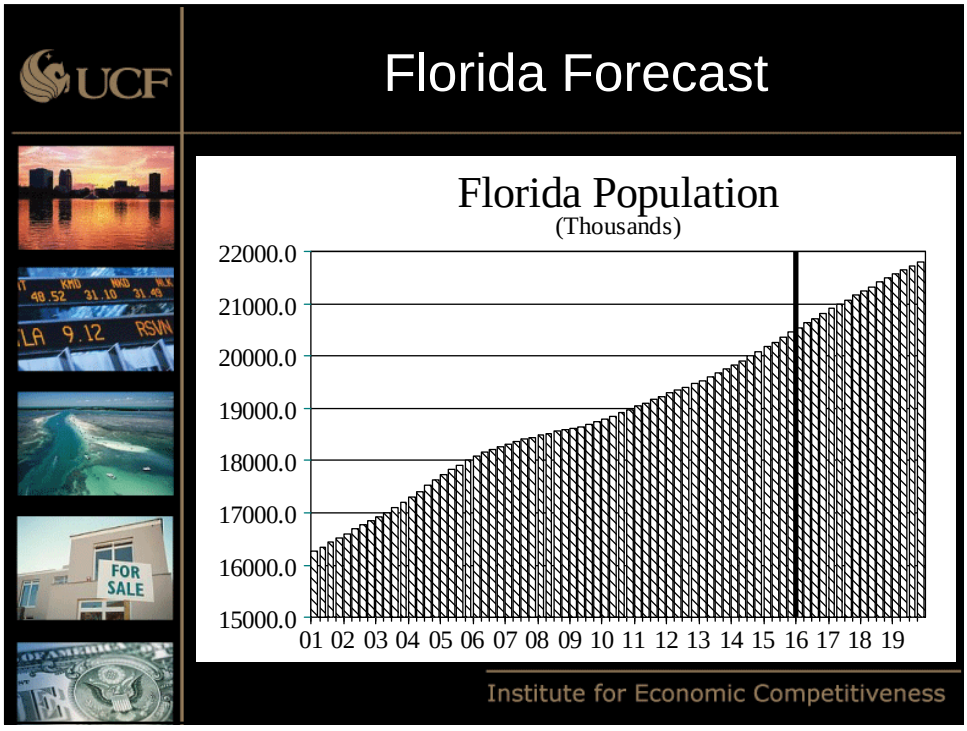


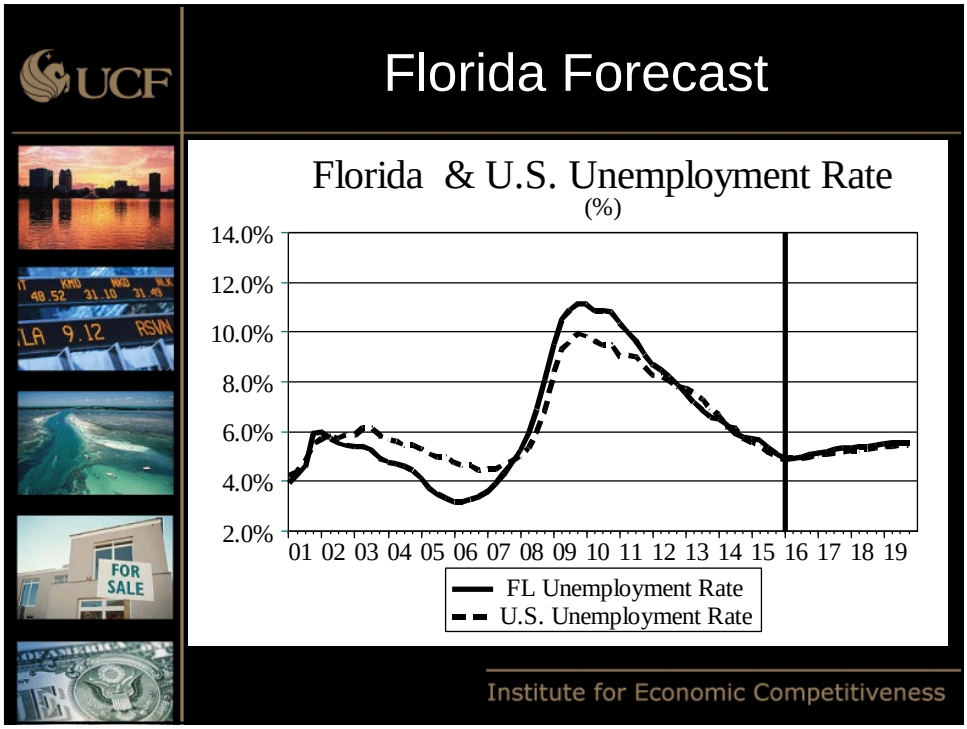
	February 2016	February 2015	Percent change
Closed Sales	18,159	18,078	0.4%
Median Sale Price	$200,000	$179,999	11.1%
Median Days on Market	57	67	-14.0%
Inventory (Months Supply)	4.5	5.2	-13.5%

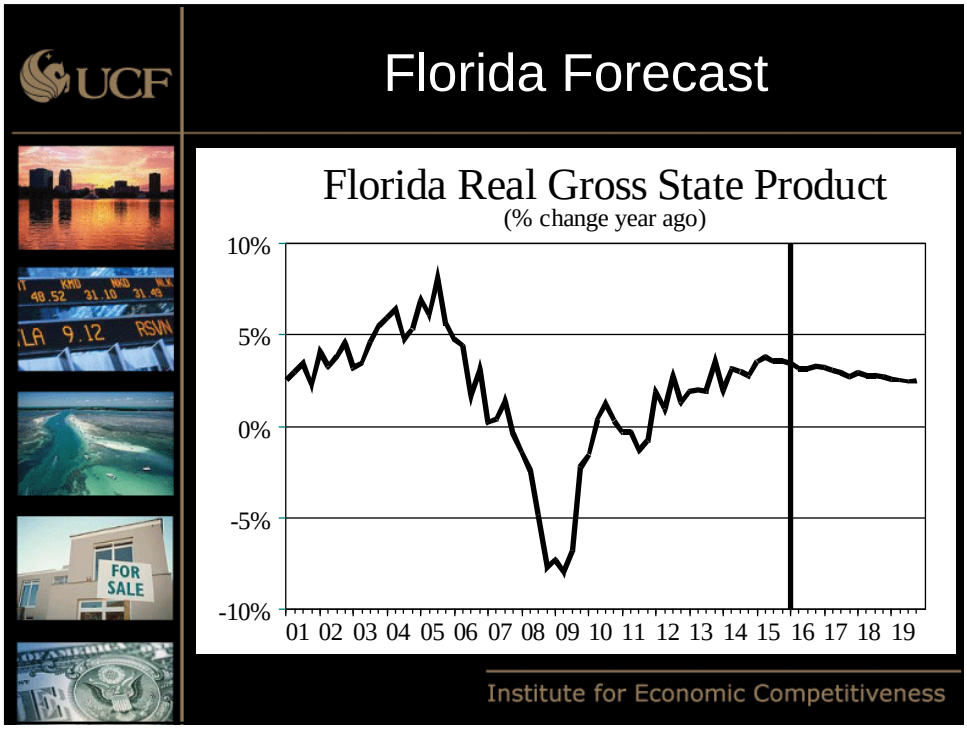


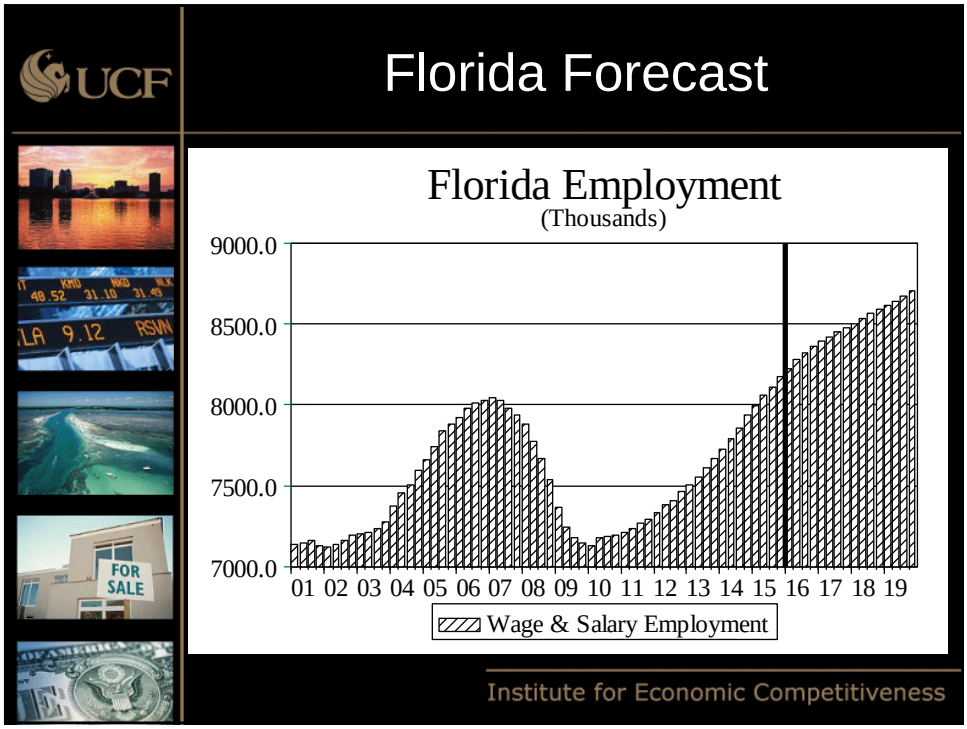
	February 2016	February 2015	Cash as % of February 2016 Sales
Florida	6,653	7,652	36.6%
Miami	1,216	1,355	36.8%
Tampa	1,196	1,347	36.4%
Orlando	669	818	30.4%
Jacksonville	456	460	31.2%

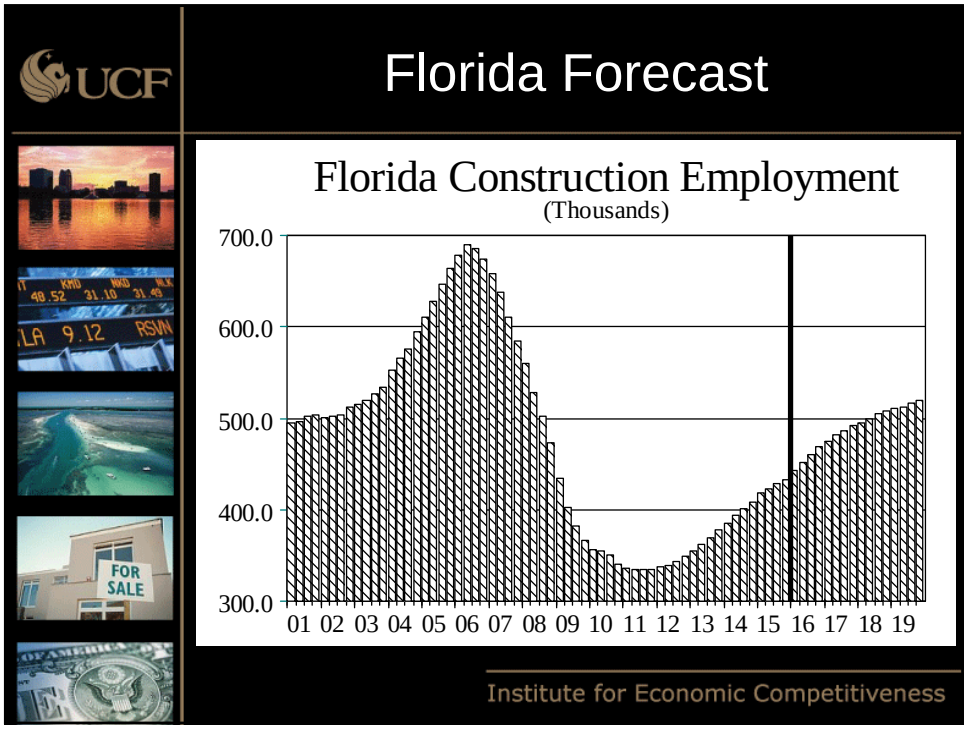

UCF
Florida Forecast
Florida Housing Starts
(thousands)
300.0
250.0
200.0
150.0
100.0
50.0
0.0
8%
7%
6%
5%
4%
3%
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
Total Private Housing Starts
30 year Mortgage Rates
Institute for Economic Competitiveness

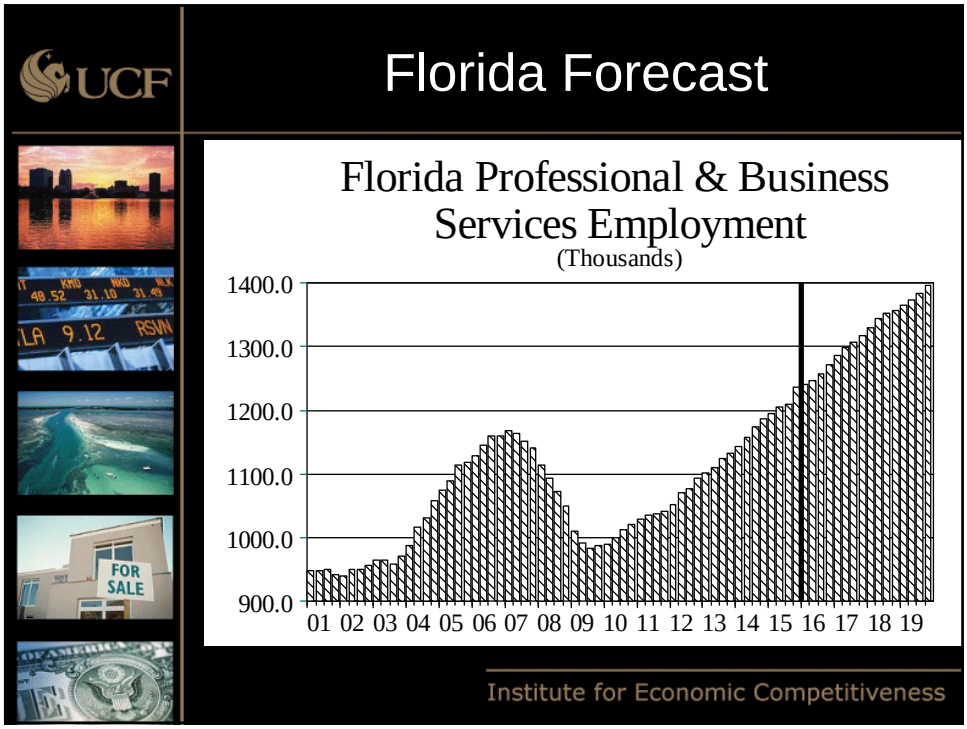

UCF
Florida Forecast
Florida Population
(Thousands)
22000.0
21000.0
20000.0
19000.0
18000.0
17000.0
16000.0
15000.0
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
Institute for Economic Competitiveness

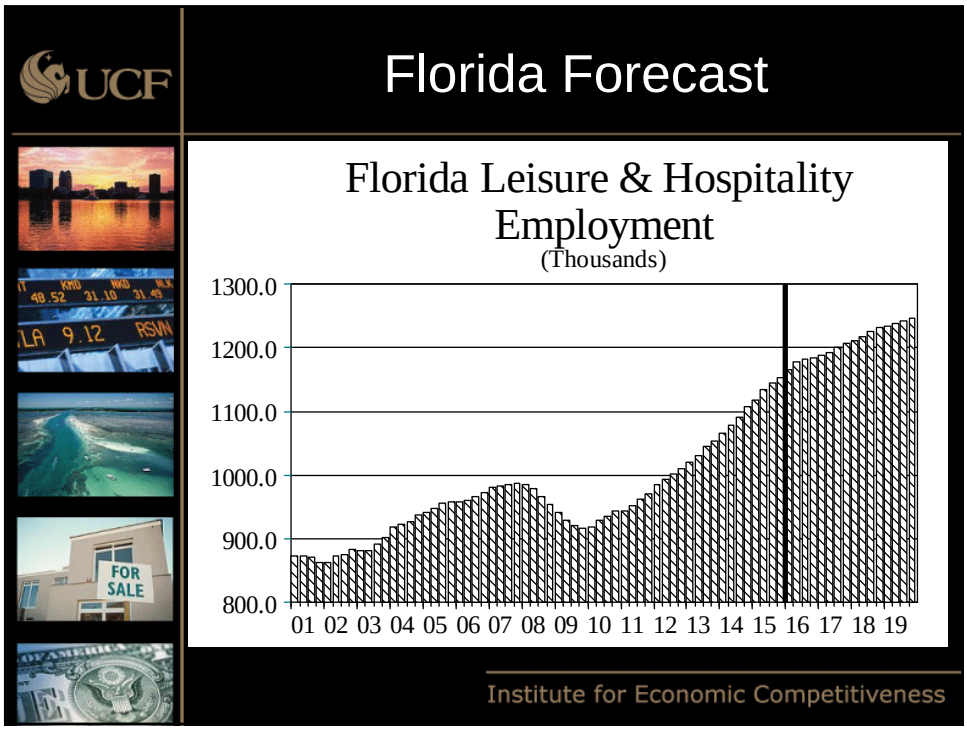

UCF
Florida Forecast
Florida & U.S. Unemployment Rate
(%)
14.0%
12.0%
10.0%
8.0%
6.0%
4.0%
2.0%
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
FL Unemployment Rate
U.S. Unemployment Rate
FOR SALE
Institute for Economic Competitiveness


UCF
Florida Forecast
Florida Real Gross State Product
(% change year ago)
10%
5%
0%
-5%
-10%
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
FOR SALE
Institute for Economic Competitiveness


UCF
Florida Forecast
Florida Employment
(Thousands)
9000.0
8500.0
8000.0
7500.0
7000.0
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
Wage & Salary Employment
Institute for Economic Competitiveness


UCF
Florida Forecast
Florida Construction Employment
(Thousands)
700.0
600.0
500.0
400.0
300.0
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
Institute for Economic Competitiveness


UCF
Florida Forecast
Florida Professional & Business Services Employment
(Thousands)
1400.0
1300.0
1200.0
1100.0
1000.0
900.0
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19
FOR SALE
Institute for Economic Competitiveness


UCF
Florida Forecast
Florida Leisure & Hospitality Employment
(Thousands)
1300.0
1200.0
1100.0
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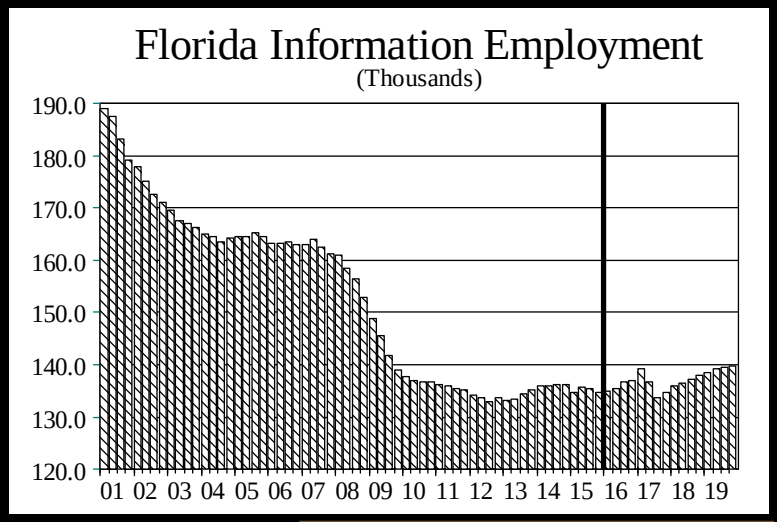
FOR SALE
Institute for Economic Competitiveness

Florida Forecast



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2016-2019 Averages; Q1 2016 Forecast

Florida	
Sector	% Average Annual Growth
Construction	4.9
Professional & Business Services	3.3
Trade, Transportation & Utilities	2.4
Leisure & Hospitality	2.2
Education-Health Services	2.0
State & Local Government	0.9
Information	0.8
Manufacturing	0.6
Financial	0.1
Federal Government	-0.6

2016-2019 Averages; Q1 2016 Forecast

Region	Population Growth	
	Average % Chg	Rank
Florida	1.7	---
Deltona	1.1	8
Gainesville	0.8	11
Jacksonville	1.4	5
Lakeland	1.1	9
Miami	1.1	7
Naples	2.5	1
Ocala	1.6	3
Orlando	2.1	2
Palm Bay	1.2	6
Pensacola	0.8	12
Tallahassee	1.1	10
Tampa	1.5	4

2016-2019 Averages; Q1 2016 Forecast

Region	Employment Growth	
	Average % Chg	Rank
Florida	1.7	---
Deltona	1.7	9
Gainesville	1.5	11
Jacksonville	2.0	8
Lakeland	2.0	6
Miami	2.0	7
Naples	3.0	1
Ocala	2.5	3
Orlando	2.9	2
Palm Bay	2.1	5
Pensacola	1.5	10
Tallahassee	1.5	12
Tampa	2.4	4

UCF
Thank you
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FUND ASSEMBLY 2016

FUND GENERAL COUNSEL PERSPECTIVE

Melissa Jay Murphy, Fund Sr. Vice President and General Counsel

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SPEAKER INFORMATION

FUND GENERAL COUNSEL PERSPECTIVE

Melissa Jay Murphy
Fund Sr. Vice President and General Counsel

Melissa Murphy is the Senior Vice President and General Counsel of Attorneys' Title Fund Services, LLC. Ms. Murphy obtained her B.S. degree from Florida State University and her J.D. degree from the University of Florida.

Prior to joining The Fund, she was in private practice in Gainesville for over 30 years, with a focus on real property transactional law. Ms. Murphy was a Fund agent and her firm has been in The Fund Top 25 several years. She also served as the Trustee from the 8th Judicial Circuit to Attorneys' Title Insurance Fund, Inc. for 14 years prior to becoming General Counsel of The Fund.

Ms. Murphy was an adjunct professor at the University of Florida for many years prior to moving to Orlando, teaching real property law at the law school and in the Masters of Science in Real Estate program in the business school. She serves on the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar and was Chair of the Section in 2005-2006.

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FUND ASSEMBLY 2016

FLORIDA LEGISLATIVE UPDATE

Michael E. Mirrington, Fund Sr. Underwriting Counsel

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SPEAKER INFORMATION

FLORIDA LEGISLATIVE UPDATE

Michael E. Mirrington
Fund Sr. Underwriting Counsel

Michael E. Mirrington is a senior underwriting counsel with Attorneys' Title Fund Services, LLC and has served in the Tampa Bay Branch since 1993. He earned his Bachelor's Degree from the University of Rochester (NY) and his Juris Doctor from The University of Toledo College of Law. Prior to joining The Fund, Mike worked for a major Sarasota law firm concentrating in commercial litigation and title insurance claims.

An AV rated attorney and Board Certified in Real Estate, he is also a member of the Florida Bar and the Hillsborough County Bar Association. Mike served for five years as president of the Bay Area Real Estate Council and is now Vice-President/Programs for that organization. In 2015, he completed six years of service on the Florida Bar's Real Estate Certification Committee and was chair of the committee during the 2011-2012 term.

LEGISLATIVE UPDATE – 2016

BY
MICHAEL E. MIRRINGTON
FUND SENIOR UNDERWRITING COUNSEL

Very special thanks for all of the contributions and assistance from R. Lynn Lovejoy, Senior Underwriting Counsel; Jalinda (Jay) Davis, Senior Underwriting Counsel; Benjamin T. Jepson, Underwriting Counsel; Elizabeth S. Ramsay, Underwriting Counsel and Charles D. Nostra, Underwriting Counsel.

FINANCIAL TRANSACTIONS
SESSION LAW CH. 2016-53 (HB 145)
EFFECTIVE JULY 1, 2016

Of importance to real estate practitioners, this bill amends Section 701.03, F.S. by reducing the time for cancellation of a mortgage from 60 days to 45 days after full payment under the promissory note, except as to the cancellation of open-end mortgages, unless the borrower gives written notice of the intent to close the mortgage. Upon such notice, the mortgagee or assignee has 60 days from receipt of said notice to cancel the open-end mortgage. The new provision does not apply to open-end mortgages existing prior to July 1, 2016, if the loan agreement included procedures for cancellation.

PUBLIC RECORDS
SESSION LAW CH. 2016-20 (HB 273)
EFFECTIVE MARCH 8, 2016

This law amends Section 119.07, F.S. in connection with private contractors that act on behalf of a public agency by:

- Repealing the requirement that each contract for services require the contractor to transfer its public records to the public agency upon termination of the contract;
- Requiring instead that the contract must provide for the contractor to either retain the public records or transfer said records to the public agency upon completion of the contract;

- Requiring contracts for services between a public agency and a contactor that are entered into, or amended, after July 1, 2016 to include (i) contract information of the public agency's custodian of public records with instruction for the contractor to contact said custodian with questions regarding contractor's duties to provide public records relating to the contract; (ii) a requirement that the contractor comply with the public agency's request for public records or permit inspection of same; (iii) a requirement that the contractor prevent disclosure of confidential or exempt information contained the public record; (iv) a requirement that the contractor comply with public records' terms even after the contract for services is completed;
- Requiring requests for public records to be made directly to the agency, and if not within the agency's possession, then immediate notification by the agency to the contractor to provide such records or allow access thereto within reasonable time or be faced with penalties;
- Providing for assessment and award of reasonable costs of enforcement against the contractor, including attorney fees, if the court finds that the contractor unlawfully refused to comply with the public records request within a reasonable time where the plaintiff shows that written notice of the request was given to the public agency and the contractor at least eight business days before filing the lawsuit.

TITLE INSURANCE
SESSION LAW CH. 2016-57 (HB 695)
EFFECTIVE JULY 1, 2016

Among other things, title insurers in Florida are required to maintain a reserve of unearned premium to guaranty against insolvency. The method of determining the amount that must be kept in this reserve is contained in Section 625.11, F.S. This bill amends that section to change the method that certain title insurers use to determine the amount that they must keep in reserve. The title insurers affected by the amendment are those title insurers that are a member of an "insurance holding company system" that holds $1 billion, or more, in surplus and has a rating of superior, excellent, exceptional or an equivalent rating by a rating agency. Additionally, the bill changes how title insurers that move their operations to Florida must calculate their unearned premium reserves. Previously, they were required to the laws of the former domiciliary state to set the reserve amount and determine when the reserves could be released. Now they are required to determine what their unearned premium reserve would have been had the title insurer been domesticated in Florida for the past 20 years and insure that they have an equivalent amount in reserve. If the actual amount the title insurer has in reserve is less than the amount determined to be required for Florida, the title insurer must make up the shortfall within six years of transferring to Florida. If the

actual amount the title insurer has in reserves exceeds the amount determined to be required for Florida, the bill authorizes the release of the reserves to surplus.

TITLE INSURANCE
HB 413 – EFFECTIVE JULY 1, 2016

This bill increases the primary limit that a single title insurance underwriter can assume, either as the primary insurer or as a participant in reinsurance or coinsurance -- from the current limit of one-half of the dollar value of its surplus to the full amount of its surplus.

The bill also allows underwriters to purchase reinsurance for any amount in excess of their statutory risk limitation from any eligible reinsurer. This expands the number of insurers that may provide title insurance reinsurance from only the other authorized Florida's title insurance underwriters to any reinsurers who are eligible to participate in the Florida insurance market.

COMMUNITY DEVELOPMENT DISTRICTS
HB 971 – EFFECTIVE JULY 1, 2016

This bill amends various sections of Chapter 190, F.S., concerning the Uniform Community Development District Act. Such amendments include:

- amending the acreage threshold for the establishment (by rule or ordinance) of a community development district;
- revising the criteria necessary for amending the boundaries of a district;
- subject to specified requirements, authorizing a certain number of districts to merge into one surviving district;
- providing for membership of the surviving merged district board;
- providing requirements for a merger agreement and public hearings; and
- prohibiting a petition to merge from being filed within a specific time frame.

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SPECIAL DISTRICTS
SESSION LAW CH. 2016-22 (HB 479)
EFFECTIVE OCTOBER 1, 2016

The bill modifies various provisions of Chapter 189, F.S. to clarify the power of the Legislature to create dependent special districts. It requires special districts to publish additional information on their websites in order to improve transparency -- including meeting dates and proposed budgets. The bill also provides for increased accountability of the districts to state and local governments. Further, the bill provides an extensive statement of legislative intent to improve accountability of special districts to state and local governments and to provide more effective communication and coordination in the monitoring process.

ASSESSMENT OF REAL PROPERTY AND TANGIBLE PERSONAL PROPERTY
HB 195 – EFFECTIVE JANUARY 1, 2017

This bill amends Section 193.624, F.S., by making it applicable to all real property as opposed to only residential real property. It creates Section 196.182, F.S., to exempt renewable energy source devices - considered tangible personal property - from ad valorem taxation. Further, the bill provides that Section 196.182, F.S., shall expire via repeal on December 31, 2036.

SPECIAL ASSESSMENTS ON AGRICULTURAL LANDS
HB 773- EFFECTIVE NOVEMBER 1, 2017

This bill creates an exception to a county or municipality's authority to levy special assessments for fire protection under Section 125.01, F.S. Pursuant to the bill, agricultural lands are now excluded from these assessments unless the land contains a residential dwelling or a nonresidential farm building worth more than $10,000.00. The bill further requires that any assessment that is levied on agricultural lands must be based on the special benefit to that portion of the land that contains a residential dwelling and/or to that portion of land that is a qualifying nonresidential farm building.

COMMUNITY CONTRIBUTION TAX CREDITS
HB 627- EFFECTIVE JULY 1, 2016

The definition of "real property" under Section 220.03, F.S. (dealing with community contributions by business firms) was expanded by this bill to include a "100 percent ownership of a real property holding company." To qualify as a "real property holding company" the entity must be a Florida entity that is the sole owner of the subject property and the entity in question must be wholly owned by the business firm making the community contribution. Additionally, the entity must be a "disregarded entity" for federal income tax purposes and it must not own any assets other than property that qualifies as a community contribution.

AD VALOREM TAXATION
HB 499 – EFFECTIVE JULY 1, 2016

This bill makes several changes to the provisions of the Value Adjustment Board (VAB) process. It amends Section 193.073, F.S., to require a property appraiser to notice a taxpayer of an erroneous or incomplete personal property tax return before the TRIM notice is mailed and allow 30 days to correct it. The bill amends Section 194.034(1)(f), F.S. [renumbered as Section 194.034(1)(j), F.S., by this bill], to require that to appeal an assessment to the VAB the tangible personal property return must have been timely filed (including any extensions granted by the property appraiser). Also, the bill requires the taxpayer to have corrected an erroneous or incomplete return within 30 days of notification.

Currently, Section 194.032(3), F.S., requires that the VAB "remain in session from day to day until all petitions, complaints, appeals, and disputes are heard." The bill now requires the VAB to hear all petitions, complaints, appeals, and disputes and submit the certified assessment roll to the property appraiser by June 1 following the year in which the assessments were made, beginning with the 2018 tax roll. The deadline may be extended to December 1st if petitions increase by 10% in any year.

The bill now makes permanent a 2015 funding solution for school districts when the local VAB process delays completion of the certification of the final tax roll for longer than one year.

Section 194.032(1)(a)5., F.S., is created to provide that taxpayers have the right to appeal the implementation of assessment caps on their property to the VAB, specifically with regard to determinations under Sections 193.155(3), 193.1554(5), 193.1555(5), 193.1555(5), F.S.

Section 194.011, F.S., is amended to require that a petition must be signed by the taxpayer or be accompanied at filing by the taxpayer's written authorization of the representation or power of attorney, unless the representative is a person listed under Section 194.034(1)(a), F.S. The interest rate for disputed property taxes at the VAB is lowered from 12 percent per annum to the bank prime loan rate.

Among other changes, the bill further:

- Restricts the ability of the hearing officer and property owner to reschedule VAB hearings;
- Amends Sections 193.1554(10) and 193.1555(10), F.S. to allow property appraisers to waive penalties and interest if an assessment limitation was improperly granted "as a result of clerical mistake of an omission by the property appraiser";
- Provides for a 30-day grace period to allow the taxpayer to pay any owed taxes, penalties or interest due before a lien is filed on his or her property;
- Amends Section 193.155(10), F.S., to clarify that a property appraiser may waive the penalties and interest for homestead property and provide that the taxpayer has the same 30-day payment grace period.

AD VALOREM TAX EXEMPTION FOR DEPLOYED SERVICEMEMBERS
SESSION LAW CH. 2016-26 (HB 7023)
EFFECTIVE MARCH 8, 2016

This bill, concerning ad valorem tax exemption for deployed service members, amends Section 196.173, F.S., by:

- expanding the military operations that qualify certain service members who receive a homestead exemption and were deployed during the previous calendar year to receive an additional ad valorem tax exemption on that homestead property;
- specifying the deadline for filing an application for the tax exemption for the 2016 tax year;
- providing procedures for filing an application for the tax exemption for a qualifying deployment during the 2014 and 2015 calendar years;
- providing procedures to appeal a denial by a property appraiser of an application for the tax exemption; and
- providing refund procedures for service members who were on qualifying deployments for more than 365 days during the 2014 and 2015 calendar years.

HOMESTEAD TAX EXEMPTION
HJR 275 – EFFECTIVE JANUARY 1, 2017 AND RETROACTIVE TO 1/01/13, FOR ANYONE WHO RECEIVED THE EXEMPTION PRIOR TO 1/01/17

This joint resolution, if approved by the voters, will amend the Florida Constitution to limit the just value determination, for the purpose of calculating and assessing ad valorem taxes, to the value as determined in the first tax year that the owner applied for and was eligible for the low-income senior's homestead exemption. If it becomes law, the exemption afforded to low-income seniors that have maintained their homestead for not less than 25 years since January 2013 may no longer be denied due to the value of the property increasing to $250,000 or more, if the senior previously applied for and received the exemption. The exemption will be effective as of January 1, 2017 and retroactive to January 1, 2013 for any person already receiving the exemption prior to January 1, 2017.

HOMESTEAD TAX EXEMPTION
HB 277 – EFFECTIVE 1/01/17, IF JOINT RESOLUTION 275 IS APPROVED BY THE ELECTORS AT THE GENERAL ELECTION TO BE HELD IN NOVEMBER, 2016

This bill shall become law on the same date as HJR 275, if approved by the voters. In addition to the provisions of HJR 275, this bill further provides that low-income seniors who were denied the exemption in prior years, due to the just value of their homestead property increasing above $250,000, can apply to the tax collector for a refund, pursuant to Section 197.182, F.S., and any refund given to be equal to the difference between the previous tax liability for that year without the exemption and the tax liability with the exemption.

AD VALOREM TAXES
HJR 193 – EFFECTIVE JANUARY 1, 2018

This joint resolution, if approved by the voters, will amend Section 3 and 4 of Article VII and create Section 34 of Article XII of the Florida Constitution to exempt renewable energy source devices and their components from being included in the assessed value of personal property ad valorem taxes and to prohibit such devices and their components from being included in the assessed value of real property ad valorem taxes.

TAX EXEMPTION FOR TOTALLY AND PERMANENTLY DISABLED FIRST RESPONDERS
HJR 1009 – EFFECTIVE JANUARY 1, 2017

This joint resolution, if approved by the voters, will amend Section 6 of Article VII and create a new section in Article XII of the Florida Constitution to authorize a first responder, who is totally and permanently disabled as a result of an injury sustained in the line of duty, to receive relief from ad valorem taxes assessed on homestead property.

FAMILY TRUST COMPANIES
SESSION LAW CH. 2016-35 (SB 80)
EFFECTIVE MARCH 10, 2016

This law amends the Florida Family Trust Company Act passed in 2014 and which became effective October 15, 2015. That Act allows families to form and operate family trust companies (FTC). These FTCs are composed exclusively of one or more family members. FTCs act as fiduciaries for their family members. This new law substantially amends several sections within in Chapter 662, F.S. and adds Section 662.113, F.S. The major changes include clarifying requirements for registration, amending the time to renew licenses or registrations, creating a way for automatic reinstatement of lapsed licenses or registrations, requiring examinations of licensed FTCs to occur every 36 months instead of every 18 months, and requiring a court to determine breach of fiduciary duty or trust before issuance of a cease and desist order.

GUARDIANSHIP
SESSION LAW CH. 2016-40 (SB 232)
EFFECTIVE MARCH 10, 2016

This law deals with public guardianship and professional guardians. These guardianships are court-appointed for incapacitated individuals when there is no related person that can care for them as a private guardian. This law amends various sections

of Chapter 744, F.S., and provides for better registration, regulation, development of standards of practice, and discipline of public (professional) guardians. It also encourages the use of a guardian advocate as a less restrictive means of intervention.

REPEAL OF PROHIBITION ON COHABITATION
SB 498 - EFFECTIVE UPON BECOMING LAW

The current provision under Section 798.02, F.S. against cohabitation of an unmarried man and woman in Florida will be repealed if this bill becomes law. Florida is one of three remaining states that still have laws prohibiting cohabitation. If this bill becomes law, only Michigan and Mississippi will have laws that make cohabitation illegal.

TRUSTS AND ESTATES
SB 540 – EFFECTIVE JULY 1, 2016

This bill clarifies that disposition of real property, whether an intestate or testate estate, will be determined by Florida law. It further states that if a surviving spouse of a Florida domiciled decedent decides to take an elective share of the estate, the election does not reduce what the spouse receives if the election were not made and the spouse is not treated as having predeceased the decedent.

Also, this bill specifies when a trustee may use trust assets to pay attorneys' fees and costs and establishes a procedure when defending a breach of trust claim. This part of the bill was in response to the RPPTL Section's concern about the inability of current law to provide clarity to lawyers and judges concerning attorneys' fees and costs in such cases.

MOBILE HOMES
SB 826 – EFFECTIVE JULY 1, 2016

This bill amends and clarifies several sections of Chapter 723, F.S. governing mobile homes. Among the changes are that mobile home park owners can pass on to their tenants non-ad valorem assessments or increases in assessments – provided these elements were disclosed prior to the tenancy. If this bill becomes law, when a park owner decides to increase the rental rate, he must provide notice to a given tenant at least 90 days before the rental agreement is due for renewal. If notice is not given 90 days beforehand, the rental agreement stays the same until 90 days' notice has been given.

With this bill, mobile home purchasers will be permitted to cancel or rescind a contract for a mobile home if tenancy in a mobile home park has not been approved by the park owner 5 days before the closing of the purchase of the mobile home.

This bill also provides for new requirements for forming a homeowners' association and for the members who agree to become bound by the articles of incorporation, bylaws and policies of the association.

JUDGMENTS
SESSION LAW CH. 2016-33 (SB 1042)
EFFECTIVE JULY 1, 2016

This law amends the part of Chapter 56, F.S. entitled "Final Process", which regulates how a creditor may collect a judgment against a debtor. Of interest to real estate lawyers is that this new law gives several definitions which were lacking in the former statutes. Executions can now take place on orders as well as judgments and decrees.

New Section 56.30, F.S. was created to clarify discovery in proceedings supplementary. In addition to any other discovery permitted under the rules of civil procedure, on motion by the creditor, the court shall require the debtor to appear before the court or special magistrate at a time and place specified to be examined under oath concerning property subject to execution. All testimony directly or indirectly aiding in satisfying the execution is admissible. A corporate judgment debtor must attend and answer by a designee with knowledge or an identified officer or manager who may be specified in the order. Examination of witnesses shall be the same as if they were at trial and any party may call other witnesses to be examined concerning property that may be subject to execution.

TRANSPORTATION
HB 7061 – EFFECTIVE JULY 1, 2016

This is a comprehensive bill amending various sections of the Florida Statutes related to transportation, airports, ports and economic development. Of interest to real property practitioners is the amendment to Section 332.08, F.S., concerning municipalities which have established, or may establish, airports, restricted landing areas, navigation facilities or property set aside for such uses. Among other things, this bill revises the maximum period of time that a municipality may lease airports, navigation facilities, or related real property.

BUILDING CODES
HB 535 – EFFECTIVE JULY 1, 2016

This bill revises provisions related to Florida Building Code with respect to the Compliance and Mitigation Program, portable pools, Florida Homeowners' Construction Recovery Fund, Certificates of completion for residential swimming pools, the authority of building officials to issue building permits, appeal boards and certain fire service access elevators. The bill also creates a taskforce to study electrical safety in swimming pools and a taskforce to study issues associated with training of the construction industry workforce.

WATER AND WASTEWATER
HB 491 – EFFECTIVE JULY 1, 2016

This bill adopts several recommendations of the Study Committee on Investor-Owned Water and Wastewater Utility Systems (IOU) created under Chapter 2012-187, Laws of Florida. Among other things, the bill:

- Requires that the Public Service Commission (PSC) review certain private activity bonds;
- Creates exemptions from sales tax and exempts from regulation re-sellers of water to certain users where the mark-up does not exceed 9%;
- Requires the PSC upon request to create utility reserve fund for infrastructure repair /replacement and approve disbursements;
- Identifies eligible "pass through" expenses;
- Authorizes the PSC to review and investigate certain drinking water quality and wastewater service issues;
- Requires that counties regulate water/wastewater services to ensure service is not interrupted when water and wastewater systems are abandoned by IOUs;
- Expands the availability of loans from the Water Pollution Control Financing Corporation.

SMALL COMMUNITY SEWER CONSTRUCTION
SESSION LAW CH. 2016-55 (HB 525)
EFFECTIVE JULY 1, 2016

This bill redefines the term "financially disadvantaged small community" to include counties and special districts with the same population and per capita annual income

parameters as currently required for “communities“ under the Act - Section 403.1838, F.S. Also, the bill limits the availability of the assistance to a special district only if its public purpose includes water and sewer services, utility systems and services, or wastewater systems.

CONSERVATION EASEMENTS
SB 190 – EFFECTIVE JULY 1, 2016

A conservation easement is a right or interest in a land or water area which appropriately is retained in natural, scenic or open conditions. Conservation easements, under present law, allow for a tax exemption if the real property is dedicated in perpetuity for conservation purposes. However, under the present law, annual applications for the tax exemption are required. If this bill becomes law, the property owner will not be required to file a renewal application until the use of the property no longer complies with the restrictions and requirements of the conservation easement.

RELOCATION OF UTILITIES
SESSION LAW CH. 2016-44 (SB 416)
EFFECTIVE MARCH 10, 2016

Under this law, the burden of who pays for utility relocation costs is shifted. Now taxpayers, rather than the utility owner or user, bear the cost of relocation when the utility line is relocated from a public easement. Relocation costs of utilities located along a road or corridor will become the responsibility of the government. These changes came about to overturn the results in *Lee County Electric Cooperative, Inc. vs. City of Cape Coral,* 159 So. 3d 133 (Fla. 2nd DCA, 2012).

UTILITY PROJECTS
HB 347 – EFFECTIVE JULY 1, 2016

This bill allows some local agencies to apply for utility cost containment bonds to finance the costs of utility projects. The bill also provides criteria for applying for funds and drafting financing resolutions as well as procedures and requirements related to such financing.

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ENVIRONMENTAL CONTROLS
HB 589 – EFFECTIVE UPON BECOMING LAW

The bill repeals Section 373.245, F.S. regarding violations by holders of consumptive use permits and also amends the requirements for water well contractor licensure examination in Section 373.323(3)(b), F.S. It also creates new subsection 378.209(4), F.S., regarding the timing of reclamation for efforts in phosphate mining operations and clay settlement areas associated with such mining. The bill expands the ability of DEP 's use of funds from the solid waste landfill closure account within the SWMTF on closure and long-term care of landfills. Further, the bill amends Section 403.814(2), F.S., to require a Florida registered professional certification of a storm water management system that is be submitted to DEP or a water management district before construction of the storm water management system begins.

NONRESIDENT PLAINTIFFS IN CIVIL ACTION
SESSION LAW CH. 2016-43 (SB 396)
EFFECTIVE JULY 1, 2016

Of interest to real estate attorneys, this law repeals Section 57.011, F.S. which required nonresident plaintiffs in a civil action to post security for costs.

SERVICE OF PROCESS ON FINANCIAL INSTITUTIONS
SB 1104 – EFFECTIVE JANUARY 1, 2017

This bill clarifies how financial institutions should be served with process. New Section 48.092, F.S. states that service of process on financial institutions must be made in accordance with Section 655.0201, F.S. If this bill becomes law, any financial institution may designate with the Department of State a sole location or agent within the state to accept service of process during normal business hours (9 am – 5 pm), Monday through Friday, excluding federal and Florida holidays. If the financial institution has no registered agent, service may be made to any officer, director, or business agent of the financial institution at its principal place of business or at any branch, office, or place of business in the state.

PUBLIC RECORDS
SB 592 – EFFECTIVE UPON BECOMING LAW

This bill exempts from public inspection and disclosure the home addresses, dates of birth, phone numbers and photographs of non-sworn current or former investigative personnel of Department of Financial Services, along with their spouses and children. However, these exemptions are subject to review due to the Open Government Sunset Review Act. If this bill becomes law, the law will automatically be repealed on October 2, 2021, unless re-enacted.

ADDRESS OF LEGAL RESIDENCE
SESSION LAW CH. 2016-23 (HB 541)
EFFECTIVE JULY 1, 2016

The bill provides a definition of "legal residence" as that term is used (but not defined) in Chapter 97, F.S., the Florida Election Code. "Address of legal residence" is now defined as the legal residential address of an elector and includes all information necessary to distinguish one residence from another, including, but not limited to, apartment, suite, lot, room, or dormitory room numbers.

FUMIGATION
HB 1205 – EFFECTIVE JULY 1, 2016

Among other things, under Chapters 482 and 487, F.S., this bill authorizes the Department of Agriculture and Consumer Services to adopt safety procedures for the clearance of residential structures before reoccupation after fumigation.

FAMILY LAW
HB 967 – EFFECTIVE JULY 1, 2016

This bill creates part III of Chapter 61 of the Florida Statutes, consisting of Secs. 61.55 - 61.58, F.S., entitled the "Collaborative Law Process Act" (the "Act"). The Act is based upon the Uniform Collaborative Law Rules/Act (amended in 2010), which regulates the use of collaborative law for use in dissolution of marriage and paternity actions. The bill provides the grounds for beginning, conducting and terminating a collaborative law process and the necessary privileges and confidentiality of communications required for the collaborative law process.

Pursuant to newly created Sec. 61.56(5), F.S., the collaborative process is limited to issues governed by Ch. 61, F.S., and Ch. 742, F.S., including:

- Marriage, divorce, dissolution, annulment, and marital property distribution;
- Child custody, visitation, parenting plan, and parenting time;
- Alimony, maintenance, and child support;
- Parental relocation with a child;
- Parentage and paternity; and
- Re-marital, marital, and post-marital agreements.

SCRUTINIZED COMPANIES
SESSION LAW CH. 2016 – 36 (SB 86)
EFFECTIVE MARCH 10, 2016

This law requires the State Board of Administration (SBA) to identify and assemble a list of companies that boycott Israel in which the SBA has direct or indirect holdings or could possibly have such holdings in the future. It requires that the SBA update the list and make it available to the trustees of the SBA, the President of the Florida Senate, and the Speaker of the Florida House of Representatives. This law limits governmental entities from contracting with companies on the list that boycott Israel because many of these companies may affect the funds, assets and investments of the State of Florida which provide services to residents of Florida.

DEPARTMENT OF FINANCIAL SERVICES
HB 651- EFFECTIVE JULY 1, 2016

This bill amends various statutes that regulate the Florida Department of Financial Services. Of particular note is the amendment to Section 48.151, F.S., which deals with service of process on statutory agents for certain persons. Section 48.151(3), F.S. was amended to allow the Department of Financial Services to create an internet-based system to accept service of process electronically.

AGRICULTURE
HB 749- EFFECTIVE JULY 1, 2016

Various statutes dealing with agriculture were amended by this bill, including Section 704.06, F.S., regarding conservation easements. The bill allows for conservation easement agreements to provide that “agricultural activities” can continue on the easement. If so provided, the agricultural activities must be conducted in accordance with the Department of Agriculture and Consumer Services best practices.

AGRITOURISM
SESSION LAW CH. 2016-14 (HB 59)
EFFECTIVE JULY 1, 2016

This bill amends and supplements the legislative intent under Section 570.85, F.S. to promote agritourism and to limit local governmental control over lands classified as agricultural land under Section 193.461, F.S., except as to substantial off-site impact of agritourism activities. The bill adds to the list of activities defined under Section 570.86, F.S., and places where agritourism activity can occur. It also amends Section 570.87, F.S., to prevent agricultural lands classified under Section 193.461, F.S., from being divested of such classification if used for bona fide agricultural purposes.

DREDGE AND FILL ACTIVITIES
SB 1176 – EFFECTIVE UPON BECOMING LAW

This bill authorizes the Department of Environmental Protection to implement programs for a general permit for dredge and fill activities involving ten acres or less of wetlands or other surface waters so long as in agreement with the United States Army Corps of Engineers and the permit is protective of the natural resources and environment under existing state law. Present law only allows three acres to be so impacted.

LIMITED SINKHOLE COVERAGE INSURANCE
SB 1274 – EFFECTIVE JULY 1, 2016

Present law on sinkhole insurance coverage under Chapters 624 and 627, F.S. only requires such coverage for catastrophic ground cover collapse. If this bill is signed into law, limited sinkhole loss coverage would apply even for less than catastrophic ground cover collapse. For additional premium, property owners could receive sinkhole coverage for any structure, including personal property contents. This coverage could also include repairing the building structure or foundation. Policyholders would also be able to choose deductibles in various amounts.

HOUSING ASSISTANCE
SB 1534 – EFFECTIVE JULY 1, 2016

This bill makes numerous changes in laws having to do with housing assistance, including housing assistance for individuals and families who are homeless. Among the changes are that the State Office on Homelessness in conjunction with other agencies giving care to the homeless will develop a system and process of data collection for the purpose of analyzing trends and impacts on the homeless delivery system.

New Section 420.6265, F.S., entitled “Rapid Housing”, was created to use temporary financial assistance and case management to move an individual or family out of homelessness and into permanent housing.

ELEVATORS
SB 1602 – EFFECTIVE JULY 1, 2016

This bill, if signed into law creates Section 399.031, F.S. establishing requirements for placing an elevator within a residence. It applies to all new elevators that are going to be in a residence. The requirements for the size of the elevator and where the elevator is placed are very specific.

LEGISLATIVE SESSION
SB 7076 – EFFECTIVE UPON BECOMING LAW

This bill, if made law, will change when the Florida Legislature convenes its Regular Session in 2018. The fixed date for commencement of the 2018 regular session of the Florida Legislature will be January 9, 2018, with adjournment 60 days later.

Note: This year the Legislature convened on January 12th and adjourned on March 11th.

This summary is not intended to cover every bill or every aspect of every bill that might be of interest to real estate attorneys. For purposes of this summary, the bills listed have at least passed both houses at the time of printing. In order to become law, the bill must pass both houses and be signed into law by the Governor. For more complete information on a certain bill or to download and/or print complete bills, please go to www.myfloridahouse.gov or www.flsenate.gov. You can download and print the bills of both houses at either site. Both sites also have bill trackers so you can track bills for either house during the next legislative session.

Both the House and Senate have Facebook and Twitter as their official social channels.

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FUND ASSEMBLY 2016
TITLE TEASERS

Moderator
John D. Benson, Fund Sr. Underwriting Counsel

Expert Panel
Benjamin Jepson, Fund Underwriting Counsel
Charles Nostra, Fund Underwriting Counsel
Elizabeth "Liz" Ramsay, Fund Underwriting Counsel

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SPEAKER INFORMATION

TITLE TEASERS

John D. Benson
Fund Sr. Underwriting Counsel

John D. Benson is a Fund Senior Underwriting Counsel in the Palm Beach Branch. He received his B.S. degree in business administration and economics from the University of Florida and his J.D. degree from Nova Southeastern University Law School.

Prior to joining The Fund, Mr. Benson was in private practice with a concentration in real estate transactions and closings. He has been a guest lecturer at Nova Southeastern Law School and an adjunct professor at Palm Beach College. Mr. Benson is a member of The Florida Bar's Real Property, Probate & Trust Law Section; the Palm Beach County Association; and American Bar Association.

Benjamin Jepson
Fund Underwriting Counsel

Benjamin ("BEN") Jepson is an underwriting attorney for Attorney's Title Fund Services, LLC, working in the Naples Branch. Prior to becoming an underwriting attorney for The Fund, he was a Fund member for many years while running a private practice in Naples, Florida. During that time, his practice mainly focused on Real Estate, Estate Planning and Probate.

Mr. Jepson remains active in his community. He volunteers with various non-profits, including Meals of Hope, is a member of the Naples Area Board of Realtors and volunteers at his son's school. Mr. Jepson is also a Past-President of the P.O.L.O. Club of Collier County. He obtained his B.S. degree in Psychology and his J.D. degree from the University of Florida. Mr. Jepson has been a presenter for seminars on trusts and is a member of the Real Property, Probate & Trust Law Section of the Florida Bar.

Charles Nostra
Fund Underwriting Counsel

Charles Nostra joined Attorneys' Title Fund Services, LLC in September 2014, as Underwriting Counsel in the Broward Branch. He obtained his B.A. degree in Criminal Justice from Florida Atlantic University and his J.D. degree from University of Miami School of Law.

His prior experience includes working as claims counsel for a national title insurance underwriter and in private law firms, focusing his practice on title claims resolution, title curative measures and residential mortgage foreclosures representing lending institutions. Mr. Nostra also spent over nine years as Assistant Corporate Counsel for a national civil engineering firm. He is a member of The Florida Bar's Real Property, Probate & Trust Law Section.

Elizabeth "Liz" Ramsay
Fund Underwriting Counsel

Elizabeth "Liz" Ramsay joined the Miami-Dade Branch of Attorney's Title Fund Services, LLC, as an underwriting counsel in January 2014. She obtained her B.A. degree in English Literature from Florida International University and her J.D. degree from Nova Southeastern University. Ms. Ramsay brings with her over twenty years of experience in real estate law, with extensive experience in lender (private and institutional) and Homeowners' and Condominium Association foreclosures, and commercial and residential real estate closings. She is a member of The Florida Bar's Real Property, Probate & Trust Law Section.

FUND ASSEMBLY
MAY 5-7 2016

TITLE TEASERS

Moderator:
John D. Benson
Sr. Underwriting Counsel

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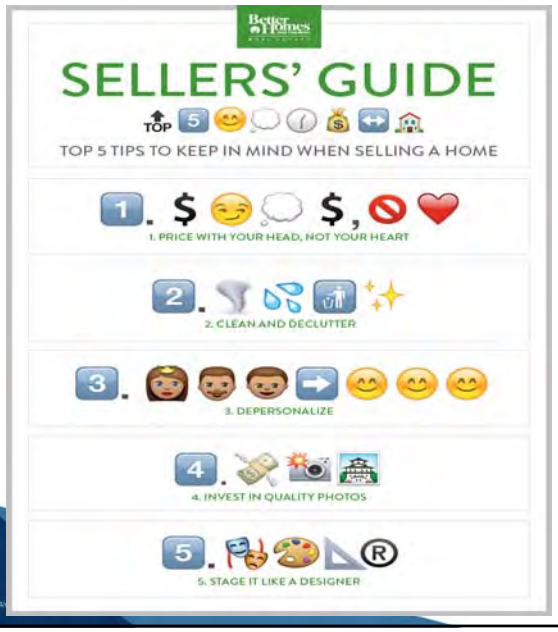
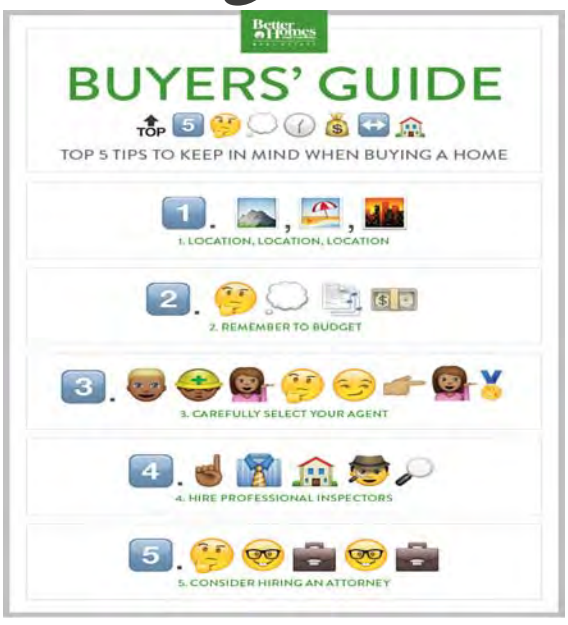
Embrace the Change





Distinguished Member's Panel

FUND ASSEMBLY
MAY 5-7 2016

Steven L. Borstein, Esq. – Transfer Title Services, Inc.

Richard P. Breger, Esq. – Empire Title Services, Inc.

Jack Brugger, Esq. - Forsyth & Brugger, P.A.

The Fund ALWAYS DRIVEN

Panel of Expert Underwriting Counsel

FUND ASSEMBLY
MAY 5-7 2016

Charles D. Nostra, Esq. – Broward Branch

Elizabeth S. Ramsay, Esq. – Miami-Dade Branch

Benjamin T. Jepson, Esq. – Naples Branch

The Fund ALWAYS DRIVEN

1. Bankruptcy – Lien Stripping

Bilbo Buyer has a contract to purchase the Underworld from Darklord Debtor, who is in the midst of a Ch. 7 bankruptcy. The Underworld has been claimed as exempt homestead on Schedule C of the bankruptcy petition, and no objections have been made following the § 341 Meeting of Creditors. Darklord Debtor represents that a $50,000 second mortgage on the property has been "stripped" given that the balance of his first mortgage is $100,000 and value of the Underworld has been established in the bankruptcy at $75,000.

For purposes of issuing an owner's policy to Bilbo Buyer without exception for the second mortgage, must a satisfaction be obtained and recorded?

Bankruptcy – Lien Stripping

A. No satisfaction of the second mortgage is required because the objection period following the conclusion of the §341 Meeting of Creditors has expired.

B. A satisfaction of the second mortgage is required because the first and second mortgage holders are entitled to their pro-rata share of the value of the property.

C. A satisfaction of the second mortgage is required because even liens lacking any value in the collateral cannot be "stripped".

2. Claim of Lien

Buchanan Builders commenced construction of the new Truman Tower Apartments on property owned by the Lincoln Legacy Foundation and filed the appropriate notice of commencement.

Garfield Granite records a claim of lien for materials that were installed but full payment was not received. Buchanan and Lincoln feel Garfield's lien is not justified due to sloppy work, but don't want to hold up the sale to Presidential Properties.

For insuring purposes, what can Washington Title rely upon to issue on owner's policy without exception for the claim of lien?

Claim of Lien

A. Evidence of a properly completed Notice of Contest of Lien under Sec. 713.22(2), F.S.,

B. Evidence of the filing of action to show cause and an order of cancellation of the lien under Sec. 713.21, F.S.

C. Either A or B

3. Seller Financing

Helpful Harry is selling a house to his friend, Christina Consumer and wants to take back a seller held mortgage loan to help Christina finance the sale.

Harry has made two low-interest mortgage loans in the previous calendar year, but this sale will be his only seller-financing transaction for the current year. Christina agrees to a 15 year mortgage with a balloon payment due in three years.

Can a loan policy insuring the mortgage be issued?

Seller Financing

A. Yes, a loan policy can be issued provided Harry prepares a Loan Estimate and Deliver a Closing Disclosure to Christina at least three days prior to closing.

B. Yes, the loan is insurable because Harry qualifies for the “three property” seller financing exclusion.

C. Yes, the loan is insurable because lender regulatory compliance does not affect insurability under a title policy.

4. Amount of Coverage – OP

Cheech and Chong lent money to B. Marley so he could purchase his first home, secured by a first mortgage.

Marley decided to move to Colorado to make his fortune in the medical marijuana business, and failed to make any further mortgage payments to Cheech and Chong. The mortgage was foreclosed and Cheech and Chong used their credit bid to purchase the property at the foreclosure. They would like an owner's title policy insuring the home.

An owner's policy should be issued for which of the following coverage amounts?

Amount of Coverage – OP

A. The current fair market value of the property.

B. The amount of the mortgage that was foreclosed.

C. The amount of the final judgment of foreclosure, plus interest from the date of the entry of the judgment.

5. Modification of mortgage

Bob the Buyer is purchasing Greenacre and obtaining an owner's policy for $1.2MM.

The purchase is being financed through a future advance of $500,000 on a mortgage insured under an existing ORNTIC MF6 loan policy already in place on Bob's other property. The mortgage modification will also spread the lien to Greenacre and there are no other changes contained in the modification or any off record affiliated documents.

For purpose of rating the mortgage modification, which loan policy premium applies:

Modification of mortgage

A. The loan policy premium will be based on substitution rates for the outstanding mortgage balance and simultaneous issue rates for the future advance amount.

B. The loan policy premium will be based just on simultaneous issue rates for the future advance amount.

C. The loan policy premium will be based on substitution rates for the outstanding balance and regular rates for the future advance.

6. Notary

Chris Counselor is the closing agent on the purchase of real property in Palm Beach County.

Sam Seller executes the deed and all related closing documents at the office of his personal attorney, Libby Lawyer.

Chris' review reveals that the deed was notarized by Libby Lawyer.

For insuring purposes, may Chris rely on the deed notarized by Ms. Lawyer?

Notary

A. Yes, Florida notary publics are only prohibited from notarizing the signature of their spouse, son, daughter, mother or father.

B. No, Florida notary publics are prohibited from notarizing the signature of a document where they have a financial interest in the transaction.

C. No, Florida notary publics are prohibited from notarizing the signature of a document where they have an attorney client relationship.

7. Homestead and CEB Liens

Owen Owner is selling his homestead property.

An examination of title indicates Owen has another property, Money Pit, against which there exists a total of $40,000 in code enforcement liens.

For insuring purposes, what may you rely on for a determination of homestead to issue a policy insuring a bona fide purchaser without exception for the code enforcement liens?

Homestead and CEB Liens

A. The determination of homestead procedure under Sec. 222.01 F.S.

B. An affidavit of homestead since the CEB liens are against Money Pit and there is no need to go through the statutory procedure under Sec. 222.01, F.S.

C. A court order in a declaratory action establishing the homestead protection of the property to be insured.

8. Powers of Attorney

Peter Principal, an unmarried man, has appointed his grandson Allen Agent as his attorney-in-fact under a durable power of attorney (DPOA).

Allen is seeking to sell Peter's homestead in order to obtain funds to assist with Peter's medical and boarding expenses at Nellie's Nursing Home.

Allen's sister has filed suit for a determination of Peter's incapacity and for the appointment of a guardian.

May you rely on Peter's durable power of attorney and issue an owner's policy insuring the deed?

Powers of Attorney

A. Yes, as a DPOA, the power is not suspended upon the subsequent incapacity of the principal.

B. No, upon the filing of the proceeding for an appointment of a guardian, the DPOA is suspended.

C. Yes, as a grandchild of Peter, Allen is relative and may proceed with the sale under the DPOA unless and until a motion is filed to suspend Allen's appointment as attorney in fact.

9. Statement of Authority

A member-managed Florida Limited Liability Company names three members on Sunbiz.org, the Florida Secretary of State website. A Statement of Authority has also been filed and shown on Sunbiz.org, executed by only one of the members listed, designating a non-member as having the authority to execute instruments transferring real property held in the name of the company.

The Statement of Authority has been recorded in the county where the property is located. The insuring Fund Member has no knowledge of any limiting terms of the operating agreement.

For insuring purposes, may the Fund Member rely on the Statement of Authority to accept the signature of the non-member?

Statement of Authority

A. Yes, any one member identified as a member on Sunbiz.org is authorized to execute the Statement of Authority.

B. Yes, but the Fund Member must first review the operating agreement to determine if the member has the authority to sign the Statement of Authority.

C. Yes, but all three members must execute a consent confirming the Statement of Authority.

10. Form 9-06 Coverage

Jake owns a zero lot line home and is now getting a loan on the property he purchased for all cash a few years back.

The survey reveals his roof overhangs about 5' into the next door neighbor's property and that his other next door neighbor's roof overhangs 5' into his property.

Review of the PUD restrictions indicates that each parcel owner has an easement on each other parcel owner for any such overhang.

Which statement regarding the issuance of the Form 9-06 endorsement with the loan policy is accurate?

Form 9-06 Coverage

A. PUD restrictions providing for easements of this nature may not be relied upon for insuring.

B. The overhang should be disclosed as a specific survey matter and the easement must be mentioned in the clause excepting the restrictions.

C. A Form 9-06 cannot be issued without making a modification of its coverage as the restrictions do not cure a overhang encroachment.

11. Enhanced life estate

Due to her dangerous profession as a professional stunt woman, Mimi Turner decided to convey her rental property to herself for life, with a remainder interest to her sister, Tillie Turner, using a deed containing enhanced life estate language.

A year or so later Mimi got into a feud with Tillie and decided to do another transfer of the property, this time giving the remainder interest to her brother, Tommy, keeping an enhanced life estate for herself.

Mimi subsequently retired and decided to sell the property and found a willing buyer for cash. For insuring purposes, who must execute the deed to complete the sale?

Enhanced life estate

A. The deed must be executed by both Mimi and Tillie since she could not eliminate Tillie's interest by simply conveying to her brother in a non-arms' length transaction.

B. The deed may be executed only by Mimi.

C. The deed must be executed by Mimi, and Tillie and Tommy as both of them had remainder interests.

12. Reverse Mortgages

Fred and Wilma are refinancing their existing mortgage. When they purchased their home, they signed a reverse mortgage to their lender along with a duplicate mortgage to HUD which was recorded immediately following the reverse mortgage.

As closing agent, you have obtained a payoff letter from the reverse mortgage lender. Upon requesting contact information from HUD to obtain a payoff letter from HUD, you are informed by the reverse lender that they are fully servicing the loan and no payoff letter is necessary from HUD.

For purposes of closing the transaction and issuing a new loan policy, is a payoff letter from the reverse mortgage lender sufficient?

Reverse Mortgages

A. Yes, the payoff letter from the reverse mortgage lender is sufficient to accept satisfactions of both mortgages processed by the reverse mortgage lender.
B. Yes, a payoff letter from the primary lender is sufficient however a certificate from HUD establishing no funds have been paid out by HUD is required to accept satisfactions of both mortgages processed by the reverse mortgage lender.
C. Obtain payoff letters from both the primary lender and HUD each stating that upon payoff of the amounts owed to the lender, each shall issue a satisfaction of the mortgage.

13. Foreclosure

Les Fleurs Condominium Association, Inc., obtained a condominium unit through foreclosure of its lien when the unit owner failed to pay the maintenance.

The docket sheet reveals a return of service showing the owner and all subordinate lien holders were properly served in the lien foreclosure.

Subsequently, the first mortgagee files a foreclosure of their mortgage only naming the association as a defendant. A 3rd party was the successful bidder and is seeking to obtain an owner's policy insuring the certificate of title (CT) in the mortgage foreclosure.

Can an owner's policy be issued to the CT holder?

Foreclosure

A. Yes, an owner's policy can be issued to the certificate of title holder but only after a re-foreclosure which incudes the original mortgagor.

B. Yes, an owner's policy can be issued to the certificate of title holder.

C. No, an owner's policy can only be issued to a bona fide purchaser and not to the holder of a CT.

14. Execution of Instruments

Frank Farmer is selling a portion of his farm to a loyal farmhand, Henry Handy. Due to an unfortunate tractor accident several years ago, Frank is blind. At closing, his sister, Sally Sweet, reads all the documents to Frank who states that he is fully aware of the content and effect of the deed. Sally then signs the deed with Frank's name at his direction.

The title agent also obtains Frank's thumb print and "X" mark in the signature block . The notary acknowledges Frank's thumb print, his "X" mark, and that Sally signed on his behalf.

Was the deed properly executed for purposes of issuing an owner's policy to Henry Handy?

Execution of Instruments

A. Yes, the deed was properly executed because it was read to Frank who acknowledged its contents and affixed his thumb print.

B. Yes, the deed was properly executed because it was read to Frank who acknowledged its contents and affixed his "X" mark.

C. Yes, the deed was properly executed because it was read to Frank who acknowledged its contents and was signed by Frank's sister at his direction.

15. Land Trusts

Jennifer Sims took title to her rental property as "Jennifer Sims, as Trustee under the Hawthorne Trust Agreement dated July 1st, 2012."

Later that year, Jennifer realizes that she forgot to ask the title agent to add the statutory trust powers and name the successor trustee in the deed. The title agent finds the prior owner and records a corrective deed containing the trust powers and naming a successor trustee.

Jennifer has recently passed away and the successor trustee is in the process of selling the property. For purposes of issuing an owner's policy to the purchaser, is review of the trust and recording a trust certificate required?

Land Trusts

A. No review of the trust or recording a trust certificate is required as the deed had been corrected to name the successor trustee with powers.

B. Yes, review of the trust and recording a trust certificate is required as the original deed did not contain the trust powers or name the successor trustee.

C. Yes, review of the trust is required to confirm the successor trustee but no trust certificate needs to be recorded.

16. Foreclosure – deceased borrower

Big Bank initiates a foreclosure against Broke Borrower.

They obtain personal service against Broke Borrower, who fails to answer, a default is entered, and Big Bank proceeds to Final Summary Judgment.

Subsequent to the judicial sale, Big Bank learns Broke Borrower passed away after the default was entered but prior to the date of entry of the Final Summary Judgment.

Which of the following steps is necessary to insure title after the foreclosure sale?

Foreclosure – deceased borrower

A. No further steps are necessary, Big Bank may schedule sale and proceed to issuance of the CT.

B. Big Bank must cancel sale, vacate the Final Summary Judgment and join in the known and unknown heirs of Broke Borrower.

C. Big Bank must notice Broke Borrower's heirs of the Final Summary Judgment and pending sale should they wish to redeem the property.

17. Corrective Mortgage

Clark Closer handled a refinance transaction and recorded the mortgage. Upon review of the file, Clark realized that he failed to attach the Legal description as Exhibit A, but the mortgage did contain the street address and Parcel Tax ID number for the property.

Clark had the borrowers re-execute the mortgage, a notary re-acknowledged the execution and the mortgage was re-recorded with the attached legal description. A final update reveals a properly certified judgment was recorded against the mortgagors before the mortgage was re-recorded.

For purposes of insuring the loan policy, what must be done about the intervening judgment?

Corrective Mortgage

A. The intervening judgment may be ignored as the corrective mortgage related back to the recording of the original mortgage.

B. The intervening judgment may be ignored as the initial recorded mortgage provided constructive notice.

C. The intervening judgment should be cleared as the corrective mortgage is effective upon recording.

18. Joint Trusts - Homestead

Harry and Wanda Tremble, who acquired their homestead property as tenants by the entireties, conveyed the property to themselves as settlors and trustees of the Tremble Family Trust. The deed included the statutory land trust powers and named Tom, their eldest son, as the successor trustee. Harry passed away in 2012, followed by Wanda in 2013.

The trust provides Harry and Wanda were the lifetime beneficiaries, but upon the death of the first settlor, the homestead property would pass to the surviving spouse in fee simple absolute. Further, if the surviving spouse took no action, then upon the death of the second spouse the homestead property passed back to the then-serving trustee of the Tremble Family Trust.

Both Harry and Wanda's wills contained pour-over provisions back to the trust. For insuring purposes, are deeds from the other heirs of Harry or Wanda required in addition to a deed from Tom as successor trustee?

Joint Trusts - Homestead

A. No deeds from the other heirs of Harry or Wanda are required as the deed into the trust contained the land trust powers and named Tom as the successor trustee.
B. Deeds from the other heirs of Harry or Wanda are required as upon the death of the first spouse, Harry, his share of the property passed by intestate succession to his lineal heirs under Sec. 732.401, F.S.
C. No deeds from the other heirs of Harry or Wanda are required as the terms of the trust provided the property passed to the surviving spouse in fee simple absolute.

19. POA - Partnership

Title to Peanuts Stadium is vested in The Peanuts Family Limited Partnership, with Charlie Brown as the General Partner.

The Peanuts Family Limited Partnership is under contract, executed by Charlie to sell the stadium. Charlie will be out of contact on a long awaited cruise with famous NFL kickers. Charlie wants to give a Power of Attorney to his good friend and counsel, Joe Cool. The partnership agreement provides that Charlie may act to appoint a POA to execute deeds and other closing documents as an agent for Charlie as general partner.

Is a deed executed by the third party as attorney-in-fact for Charlie Brown, General Partner, acceptable for insuring purposes?

POA - Partnership

A. Yes, a deed executed by the third party as attorney-in-fact for Charlie Brown, General Partner is acceptable because the partnership agreement provides for delegation by the general partner.

B. No, a deed executed by the third party as attorney-in-fact for Charlie Brown, General Partner is not acceptable because general partners may not delegate their duties.

C. Yes, because the partnership it is a Limited Partnership.

20. Termination of Condominium

The declaration of condominium for Sunny Acres Condominium was recorded in the Public Records of Palm Beach County in 2009. In 2013, the condominium form or ownership was terminated by recording of a Plan of Termination (the Plan). All the required procedures leading to the adoption and recording of the Plan were complied with and proper.

The Plan appoints a Termination Trustee and empowers the Trustee to convey the title to the former condominium property. You are insuring the sale of the former condominium property to a bona fide purchaser.

For insurance purposes, who must execute the deed to convey the former condominium property?

Termination of Condominium

A. The deed to convey the former condominium property must be executed by the Termination Trustee and by all of the former unit owners.

B. The deed to convey the former condominium property may be executed by the Termination Trustee only.

C. The deed to convey the former condominium property must be executed by the Termination Trustee and by 80% of the former unit owners.

21. Civil Law Notary

John and Jane England, having had enough of the warm, sunny Florida weather, are selling their Florida property to relocate back to London.

They execute the deed while on a home buying trip in the English countryside before a Florida Civil Law Notary, whose stamp shows a United Kingdom address.

To issue an owner's title insurance policy to the buyer, is the deed's execution and acknowledgment acceptable for insuring purposes?

Civil Law Notary

A. Yes, the deed's execution and acknowledgment before a civil-law notary of Florida with an official seal are acceptable.

B. No, the deed's execution and acknowledgment must be before a civil-law notary with an official seal residing in Florida.

C. No, the deed's execution and acknowledgment must be before a notary public with an official seal, not a civil-law notary.

22. FIRPTA Withholding

Terrance and Phillip, Canadian citizens, are selling their beachfront townhome for $299,000 to that famous cinematographer, Cecil B. DaFilm, who intends to rent it out as a movie set location.

Is withholding for the buyer/transferee required under the Foreign Investment in Real Property Tax Act (FIRPTA)? and if so, in what amount?

FIRPTA Withholding

A. Withholding under FIRPTA is not required as the buyer/transferee qualifies for an exemption.

B. Withholding under FIRPTA is required at ten percent (10%) as the purchase price is below $1MM.

C. Withholding under FIRPTA is required at fifteen percent (15%) as the buyer/transferee does not intend to use the property as a residence

FA
FUND ASSEMBLY
MAY 5-7 2016
Thank you for attending the 2016 Title Teasers
The Fund
ALWAYS DRIVEN

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FUND ASSEMBLY 2016
SPECIAL REMARKS

Charles Kovaleski, Governor on the ATFS Board of Governors

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SPEAKER INFORMATION

SPECIAL REMARKS

Charles Kovaleski
Governor on the ATFS Board of Governors, former President of Attorneys' Title Insurance Fund, Inc.

Charles J. Kovaleski serves as a Governor on the ATFS Board of Governors. He served as President of Attorneys' Title Insurance Fund, Inc. from 1985 through 2009. Mr. Kovaleski has an extensive background in bar-related title insurance and is a past president of the National Association of Bar-Related Title Insurers.

Prior to affiliation with The Fund in 1980, Mr. Kovaleski served in executive capacities with Bar- Related® title insurance companies in Kansas and Illinois. He is a graduate of the University of Illinois School of Law and is a member of The Florida Bar and the Illinois State Bar. Mr. Kovaleski was a Trustee and Vice Chair of Olivet College, Olivet, Michigan, from 1995 to 2001. He was, by appointment of the Governor of the State of Florida, a Trustee of Seminole Community College in Sanford, Florida.

From 1994 to 1997, he was President of Planned Parenthood of Greater Orlando. Mr. Kovaleski was a Director of the Greater Orlando Area Chamber of Commerce, an alumnus of Leadership Orlando (1986) and has served as a member of the Chamber's Education Task Force. He served as Chairman of Junior Achievement of Central Florida for the 1995-96 term and was the 1994 recipient of the Bronze Leadership Award of Junior Achievement (National) and the 1997 Henry Cragg Award for outstanding volunteer leadership.

Mr. Kovaleski was a member of the Board of Governors of the American Land Title Association (ALTA) from 1999 to 2005, and served as President of ALTA for the 2003-04 year. In the 1992 election year, he was the Democratic candidate for the United States House of Representatives in the 8th District of Florida.

Mr. Kovaleski has also served as Parish Council Chairman at St. Stephens Catholic Church in Casselberry, Florida. He is married to the former Rebecca Magee of Grand Rapids, Michigan, and they have two children, Michael and Kathryn and a granddaughter named Lila Ann.

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FUND ASSEMBLY 2016

BANKRUPTCY (ADVANCED LEVEL)

BREAKOUT TOPIC

John "Jay" St. Lawrence, Fund Legal Education Attorney

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SPEAKER INFORMATION

BANKRUPTCY (ADVANCED LEVEL)

John "Jay" St. Lawrence
Fund Legal Education Attorney

John B. “Jay” St. Lawerence earned a B.S. in Journalism and his law degree at the University of Florida and was admitted to the Florida Bar in 1995. He joined the Fund in 2004 as a claims attorney, and joined The Fund’s Legal and Branch Education Department in 2014.

Prior to working at The Fund, Jay practiced primarily bankruptcy and real estate law. He is a member of the Florida Bar’s Real Property, Probate & Trust Law Section and has been admitted to all Florida Federal District Courts. He is also a Florida Supreme Court Certified Circuit Mediator.

BANKRUPTCY UPDATE: Lien Stripping after *Caulkett*

FUND ASSEMBLY
MAY 5-7 2016

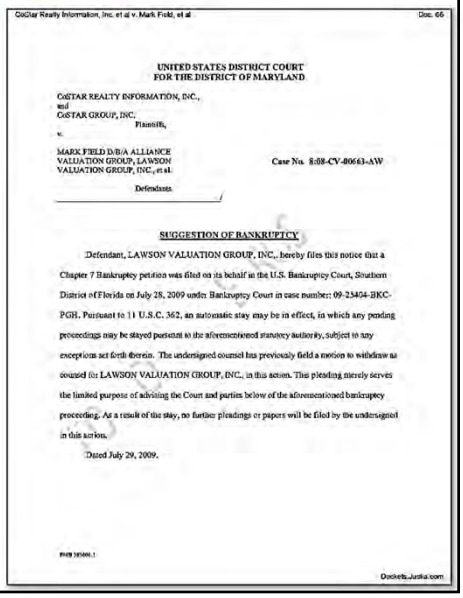
2016
Fund Assembly

The Fund ALWAYS DRIVEN

How Does a Bankruptcy Case Become an Issue in a Real Estate Transaction?

- A suggestion of bankruptcy appears in the chain (generally just when there is related litigation), or
- A party discloses the bankruptcy, or
- The bankruptcy appears on the property tax website
- The Fund requires examination of a bankruptcy in cases *in which the current owner, or any owner within the last 7 years, was a debtor in bankruptcy while in title or within 4 years of being in title.* (TN 5.06.01)

FUND ASSEMBLY
MAY 5-7 2016



CoStar Realty Information, Inc. et al v. Mark Field, et al Doc. 66

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CoSTAR REALTY INFORMATION, INC.,
and
CoSTAR GROUP, INC.,
Plaintiffs,
v.

MARK FIELD D/B/A ALLIANCE VALUATION GROUP, LAWSON VALUATION GROUP, INC., et al.
Defendants.

Case No. 8:08-CV-00663-AW

SUGGESTION OF BANKRUPTCY

Defendant, LAWSON VALUATION GROUP, INC., hereby files this notice that a Chapter 7 Bankruptcy petition was filed on its behalf in the U.S. Bankruptcy Court, Southern District of Florida on July 28, 2009 under Bankruptcy Court in case number: 09-23404-BKC-PGH. Pursuant to 11 U.S.C. 362, an automatic stay may be in effect, in which any pending proceedings may be stayed pursuant to the aforementioned statutory authority, subject to any exceptions set forth therein. The undersigned counsel has previously filed a motion to withdraw as counsel for LAWSON VALUATION GROUP, INC., in this action. This pleading merely serves the limited purpose of advising the Court and parties below of the aforementioned bankruptcy proceeding. As a result of the stay, no further pleadings or papers will be filed by the undersigned in this action.

Dated July 29, 2009.

Dockets.Justia.com

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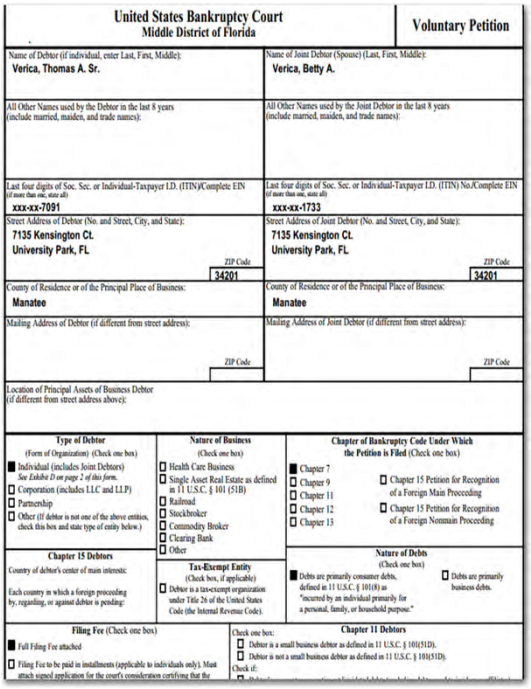
How Does Bankruptcy Work?

- Individuals or businesses (with spouses & co-debtors) file a petition
  - Ch. 7 – Individuals or businesses liquidate
  - Ch. 11 – Businesses or high-debt individuals reorganize
  - Ch. 13 – Individuals reorganize



United States Bankruptcy Court
Middle District of Florida

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
Verica, Thomas A. Sr.	Verica, Betty A.
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all): xxx-xx-7091	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all): xxx-xx-1733
Street Address of Debtor (No. and Street, City, and State): 7135 Kensington Ct. University Park, FL ZIP Code 34201	Street Address of Joint Debtor (No. and Street, City, and State): 7135 Kensington Ct. University Park, FL ZIP Code 34201
County of Residence or of the Principal Place of Business: Manatee	County of Residence or of the Principal Place of Business: Manatee
Mailing Address of Debtor (if different from street address): ZIP Code	Mailing Address of Joint Debtor (if different from street address): ZIP Code
Location of Principal Assets of Business Debtor (if different from street address above):	

Type of Debtor (Form of Organization) (Check one box)
- ■ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.*
- ☐ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business (Check one box)
- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101 (51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☐ Other

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box)
- ■ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Chapter 15 Debtors
Country of debtor's center of main interests:
Each country in which a foreign proceeding by, regarding, or against debtor is pending:

Tax-Exempt Entity (Check box, if applicable)
- ☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Nature of Debts (Check one box)
- ■ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☐ Debts are primarily business debts.

Filing Fee (Check one box)
- ■ Full Filing Fee attached
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the

Check one box:
- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:

Chapter 11 Debtors

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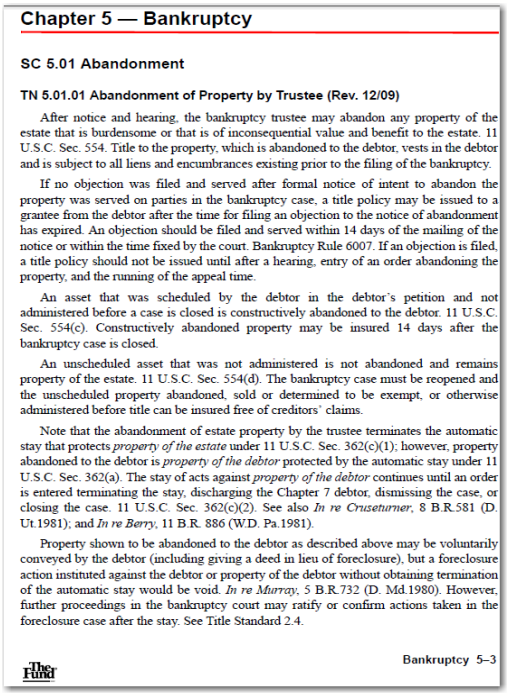
Bankruptcy Resources

- TN Ch. 5 – Bankruptcy
- **PACER** (Public Access to Court Electronic Records) -- Online bankruptcy court records with links to court documents



Chapter 5 — Bankruptcy

SC 5.01 Abandonment

TN 5.01.01 Abandonment of Property by Trustee (Rev. 12/09)

After notice and hearing, the bankruptcy trustee may abandon any property of the estate that is burdensome or that is of inconsequential value and benefit to the estate. 11 U.S.C. Sec. 554. Title to the property, which is abandoned to the debtor, vests in the debtor and is subject to all liens and encumbrances existing prior to the filing of the bankruptcy.

If no objection was filed and served after formal notice of intent to abandon the property was served on parties in the bankruptcy case, a title policy may be issued to a grantee from the debtor after the time for filing an objection to the notice of abandonment has expired. An objection should be filed and served within 14 days of the mailing of the notice or within the time fixed by the court. Bankruptcy Rule 6007. If an objection is filed, a title policy should not be issued until after a hearing, entry of an order abandoning the property, and the running of the appeal time.

An asset that was scheduled by the debtor in the debtor's petition and not administered before a case is closed is constructively abandoned to the debtor. 11 U.S.C. Sec. 554(c). Constructively abandoned property may be insured 14 days after the bankruptcy case is closed.

An unscheduled asset that was not administered is not abandoned and remains property of the estate. 11 U.S.C. Sec. 554(d). The bankruptcy case must be reopened and the unscheduled property abandoned, sold or determined to be exempt, or otherwise administered before title can be insured free of creditors' claims.

Note that the abandonment of estate property by the trustee terminates the automatic stay that protects *property of the estate* under 11 U.S.C. Sec. 362(c)(1); however, property abandoned to the debtor is *property of the debtor* protected by the automatic stay under 11 U.S.C. Sec. 362(a). The stay of acts against *property of the debtor* continues until an order is entered terminating the stay, discharging the Chapter 7 debtor, dismissing the case, or closing the case. 11 U.S.C. Sec. 362(c)(2). See also *In re Cruseturner*, 8 B.R.581 (D. Ut.1981); and *In re Berry*, 11 B.R. 886 (W.D. Pa.1981).

Property shown to be abandoned to the debtor as described above may be voluntarily conveyed by the debtor (including giving a deed in lieu of foreclosure), but a foreclosure action instituted against the debtor or property of the debtor without obtaining termination of the automatic stay would be void. *In re Murray*, 5 B.R.732 (D. Md.1980). However, further proceedings in the bankruptcy court may ratify or confirm actions taken in the foreclosure case after the stay. See Title Standard 2.4.

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Bankruptcy 5–3

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Lien Stripping in Bankruptcy

FUND ASSEMBLY
MAY 5-7 2016

- In certain cases, liens which are partially unsecured can be "stripped down" to the value of the collateral securing the lien
- Or "stripped off" and eliminated if a prior lien secures 100% or more of the value of the collateral
- Ch. 7 (liquidation) and Ch. 13 (reorganization for individuals) have different requirements and limitations
- Liens other than those secured only by a "primary residence" generally modifiable in Ch. 13 / Ch. 11

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"Strip down" vs. "Strip off"

Strip down

- Reducing a secured claim (such as a mortgage lien) down to the value of the collateral

Strip off

- Voiding a secured claim (such as a mortgage lien) when there is zero value in the collateral
- Ex) A second mortgage when the amount owed on the first mortgage exceeds the value of the property

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How Does Lien Stripping Appear in a Bankruptcy Case?

- Ch. 11 or Ch. 13 plan proposes to "strip down" or "strip off" junior liens, generally with
- Motion to value collateral, or
- Adversary proceeding to value collateral and determine validity, priority, extent of lien

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How might lien stripping impact a real estate transaction?

- Debtor seeks a new secondary mortgage during the pendency of a bankruptcy case
- Based on an existing mortgage being "stripped off" to create equity
- Debtor seeks title policy to insure new lien in second position

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Using PACER to Examine Proposed Bankruptcy Lien Stripping

- PACER account
- https://pacer.login.uscourts.gov
- Login
- Search

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Top of PACER Docket landing page confirms

- Case type
- Debtor
- Critical dates

CM/ECF Query Reports Utilities Logout

U.S. Bankruptcy Court
Southern District of Florida (Miami)
Bankruptcy Petition #: 10-49071-LMI

Assigned to: Laurel M Isicoff
Chapter 13
Voluntary
Asset
Show Associated Cases
Claims Register

Date filed: 12/28/2010
Plan confirmed: 01/27/2012
341 meeting: 02/10/2011
Deadline for filing claims: 05/11/2011
Deadline for filing claims (govt.): 06/27/2011

Debtor
Juan T Del Rosario
1351 NW 117 Street
Miami, FL 33167
MIAMI-DADE-FL
SSN / ITIN: xxx-xx-1479
***aka* Juan Thomas Del Rosario**
***aka* Juan T DelRosario**

represented by **Desiree Calas-Johnson**
782 NW 42 Ave # 447
Miami, FL 33126
(305) 476-1900
Email: rcjlawecf@gmail.com

Mary Reyes, Esq
782 NW 42 Ave #447
Miami, FL 33126
(305) 476-1900
Email: rcjlawecf@gmail.com

Joint Debtor
Josefina Del Rosario

represented by **Desiree Calas-Johnson**
(See above for address)

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PACER (Public Access to Court Electronic Records

	85	Notice to Filer of Apparent Filing Deficiency: **Document Filed in the Incorrect Case. THE FILER IS DIRECTED TO WITHDRAW THE MISDOCKETED PLEADING AND FILE THE PLEADING IN THE CORRECT CASE WITHIN TWO BUSINESS DAYS.** (Re: 84 Certificate of Service by Attorney Desiree Calas-Johnson)
86 1 pgs)		Motion to Value and Determine Secured Status of Lien on Real Property Held by Bank Of America, NA Filed by Joint Debtor Josefina Del Rosario, Debtor Juan T Del Rosario. (Calas-Johnson, Desiree) (Entered: 10/12/2011)
	87 (1 pg)	Notice of Hearing by Attorney (Re: 86 Motion to Value and Determine Secured Status of Lien on Real Property Held by Bank Of America, NA Filed by Joint Debtor Josefina Del Rosario, Debtor Juan T Del Rosario.). Chapter 13 Hearing scheduled for 11/01/2011 at 09:00 AM at 51 SW First Ave Room 1409, Miami. (Calas-Johnson, Desiree) (Entered: 10/12/2011)
10/ /2011		

Locate *specific* Motion to Value (This case has 2)

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PACER

(Public Access to Court Electronic Records)

- Document appears in .PDF format (Adobe Acrobat)
- Tip: downloadable to local machine

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI-DADE DIVISION
www.flsb.uscourts.gov

In re: Case No. 10-49071-BKC-LMI
Chapter 13

JUAN T DEL ROSARIO
AND JOSEFINA DEL ROSARIO
Debtor(s). /

MOTION TO VALUE AND DETERMINE SECURED STATUS OF LIEN ON REAL PROPERTY

IMPORTANT NOTICE TO CREDITORS:
THIS IS A MOTION TO VALUE YOUR COLLATERAL

This Motion seeks to value collateral described below securing the claim of the creditor listed below.

IF YOU DISPUTE THE VALUE ALLEGED OR TREATMENT OF YOUR CLAIM PROPOSED IN THIS MOTION, YOU MUST FILE A WRITTEN OBJECTION NO LATER THAN TWO BUSINESS DAYS PRIOR TO THE SCHEDULED HEARING [SEE LOCAL RULE 3015-3(A)(2)]

If you have not filed a proof of claim, you have until the later of the claims bar date or 21 days from the date this Motion was served upon you to file a proof of claim or you will be deemed to have waived the right to payment of any unsecured claim to which you might otherwise be entitled. [See Local Rule 3015-3(A)(4)]

1. Pursuant to 11 U.S.C. §506, Bankruptcy Rule 3012, Local Rule 3015-3, the debtor seeks to value real property securing the claim BANK OF AMERICA, NA (the "**Lender**"). Lender holds a mortgage recorded on April 12, 2006, in OR Book 24420, at Page 1431 in the official records of Miami-Dade County, Florida (the "**Second Mortgage**").

2. The real property is located at 1351 NW 117 ST MIAMI FL 33167-3221, and is more particularly described as follows:

LOT 15, BLOCK 3 OF SUNSHINE VILLAGE, ACCORDING TO THE PLAT THEREOF RECORDED IN PLAT BOOK 45, PAGE 17 OF THE PUBLIC RECORDS OF MIAMI-DADE COUNTY, FLORIDA (the "**Property**").

PACER (public access to court electronic records

10/11/2011	85	Notice to Filer of Apparent Filing Deficiency: **Document Filed in the Incorrect Case. THE FILER IS DIRECTED TO WITHDRAW THE MISDOCKETED PLEADING AND FILE THE PLEADING IN THE CORRECT CASE WITHIN TWO BUSINESS DAYS.** (Re: 84 Certificate of Service by Attorney Desiree Calas-Johnson) (Garcia, Nelly) (Entered: 10/11/2011)
10/12/2011	86 (31 pgs)	Motion to Value and Determine Secured Status of Lien on Real Property Held by Bank Of America, NA Filed by Joint Debtor Josefina Del Rosario, Debtor Juan T Del Rosario. (Calas-Johnson, Desiree) (Entered: 10/12/2011)
10/12/2011	87 pg)	Notice of Hearing by Attorney (Re: 86 Motion to Value and Determine Secured Status of Lien on Real Property Held by Bank Of America, NA Filed by Joint Debtor Josefina Del Rosario, Debtor Juan T Del Rosario.). Chapter 13 Hearing scheduled for 11/01/2011 at 09:00 AM at 51 SW First Ave Room 1409, Miami. (Calas-Johnson, Desiree) (Entered: 10/12/2011)

Note hearing date

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PACER (Public Access to Court Electronic Records

101 (1 pg)	Notice of Hearing by Attorney (Re: 100 Amended Objection to Claim of Bank Of America N.A. [# 12], Filed by Joint Debtor Josefina Del Rosario, Debtor Juan T Del Rosario.). Chapter 13 Hearing scheduled for 01/05/2012 at 09:00 AM at 51 SW First Ave Room 1409, Miami. (Calas-Johnson, Desiree) (Entered: 12/16/2011)
102	Certificate of Service by Attorney Desiree Calas-Johnson (Re: 101 Notice of Hearing by Attorney filed by Debtor Juan T Del Rosario, Joint
103 pgs)	Order n To Value and Determine Secured Status of Lien on Real Property (Re: # 86) (Garcia, Nelly) (Entered: 12/20/2011)

Find resulting Order (hold that thought …)

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Basis of Lien Stripping: "Bifurcation of Claims"

11 U.S.C.§506

(a)

1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is **a secured claim** to the extent of the value of such creditor's interest **…** and is **an unsecured claim** to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

(d) To the extent that a lien secures a claim against the debtor that is not an **allowed secured claim**, **such lien is void** …

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Lien Stripping in Bankruptcy: What is an "Allowed Secured Claim?"

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The question has largely been how to read §506(a) and §506(d) together:

- Does §506(a), which defines secured and unsecured claims by the extent of the value of the creditor's interest in the collateral held by the bankruptcy estate, apply to §506(d) which voids liens that are not "allowed secured claims" so that a lien is voided to the extent the claim exceeds the value of the property securing it?
- Meaning, does §506(d) mean that the unsecured portion of a claim based on a lien is void?
- Or does "allowed secured claim" mean something different in §506(d) than "secured claim" does in §506(a)?

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Lien Stripping in Bankruptcy: 11th Circuit View

*Folendore v. U.S. Small Bus. Admin.,*862 F.2d 1537 (11th Cir. 1989)
The 11th Circuit held:

- Because 11 U.S.C. §506(a) permits bifurcation of a claim secured by a lien into secured and unsecured claims based on the value of the creditor's lien interest, and
- §506(d) makes liens that are not "allowed secured claims" void,

- Junior liens with no value in the collateral are unsecured; therefore, whether "allowed" or not,
- Wholly unsecured junior liens can be "stripped off"

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Lien Stripping in Bankruptcy: The Supreme Court Speaks

Dewsnup v. Timm, 502 U.S. 410 (1992)
The U.S. Supreme Court held that:

- Although 11 U.S.C. §506(a) permits bifurcation of a claim secured by a lien into secured and unsecured claims based on the value of the creditor's lien interest,
- "Secured claim" doesn't mean the same thing in §506(a) and (d).
- Instead, any interest both "allowed" and secured by a lien (regardless of value) is not void under §506(d).

- Accordingly, undersecured liens cannot be "stripped down" to the value of the collateral in Ch. 7

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Dewsnup: Scalia's Dissent:

"With exceptions not pertinent here, §506(d) of the Bankruptcy Code provides: 'To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void. . . .'

Read naturally and in accordance with other provisions of the statute, this automatically voids a lien to the extent the claim it secures is not both an "allowed claim" and a "secured claim" under the Code.

In holding otherwise, the Court replaces what Congress said with what it thinks Congress ought to have said – and in the process disregards, and hence impairs for future use, well-established principles of statutory construction."

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Lien Stripping in Bankruptcy Ch. 13 Rules are Different

11 U.S.C. §1322 provides its own mechanism for lien modification in Ch. 13

11 U.S.C. §1322

(b) Subject to subsections (a) and (c) of this section, the plan may—

(2) modify the rights of holders of secured claims, **other than a claim secured only by a security interest in real property that is the debtor's principal residence**, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

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Lien Stripping in Bankruptcy Ch. 13 Rules are Different

Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993)
The U.S. Supreme Court held that:

- *Because* 11 U.S.C. §1322(b)(2) only allows modification of the rights of holders of secured claims "other than" a claim secured only by the debtor's principal residence,
- And the holder of an undersecured claim is still the holder of a (partially) secured claim,
- Ch. 13 debtors could not rely on §506(a) to "strip down" an undersecured lien on homestead property
- *Nobelman* does not address whether §1322(b)(2) bars a "strip off" of wholly unsecured liens on homestead property, where (arguably) no "secured claim" exists

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Lien Stripping in Bankruptcy: 11th Circuit Strikes Back in Ch. 13

Tanner v. FirstPlus Fin., Inc., 217 F.3d 1357 (11th Cir. 2000).
The 11th Circuit Court of Appeals held:

- The "other than" (a claim secured only by the debtor's principal residence) provision of §1322(b) does not apply to wholly unsecured claims, thus
- Wholly unsecured mortgages, even on a principal residence, can be "stripped off" in Ch. 13

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Lien Stripping in Bankruptcy: 11th Circuit Strikes Back in Ch. 7

McNeal v. GMAC Mortgage., 477 Fed. Appx. 562, 564 (11th Cir. 2012).
The 11th Circuit Court of Appeals held (but did not publish):

- *Folendore* reasoning still valid, because *Dewsnup* only applied to strip-*down* in Ch. 7; therefore,
- Wholly unsecured mortgages can still be "stripped off" in Ch. 7

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Lien Stripping in Bankruptcy: Supreme Court Finishes off Ch. 7

Bank of Am. v. Caulkett, 575 U.S. ___(2015)
The U.S. Supreme Court held that:

- As in *Dewsnup*, under §506(d) any claim both "allowed" and secured by a lien (regardless of value) is not void, and therefore
- "a debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under §506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral."
- Distinguished from Nobelman: "Nobelman said nothing about the meaning of the term 'secured claim' in §506(d)."

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Lien Stripping in Bankruptcy: Supreme Court Finishes off Ch. 7

Bank of Am. v. Caulkett, 575 U.S. ___(2015)
The U.S. Supreme Court held that:

- As in *Dewsnup*, under §506(d) any claim both "allowed" and secured by a lien (regardless of value) is not void, and therefore
- "a debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under §506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral."
- Distinguished from Nobelman: "Nobelman said nothing about the meaning of the term 'secured claim' in §506(d)." (*Nobelman* discussed §1322(b) instead)

Lien stripping in Ch. 7 bankruptcy cases is

GONE*

***Judicial liens that impair an exemption may still be avoided**

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Caulkett: An Ambivalent Supreme Court?

In a seven-page opinion, Justice Thomas points out that the debtors did not ask the Court to overrule *Dewsnup three times*.

"Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule Dewsnup."

Justice Scalia, after dissenting so strongly in *Dewsnup,* joined the majority.

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Caulkett: An Ambivalent Supreme Court?

"In other words, if the value of a creditor's interest in the property is zero—as is the case here—his claim cannot be a "secured claim" within the meaning of §506(a).

And given that these identical words are later used in the same section of the same Act—§506(d)—one would think this "presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." … Under that straightforward reading of the statute, the debtors would be able to void the Bank's claims.

Unfortunately for the debtors, this Court has already adopted a construction of the term 'secured claim' in §506(d) that forecloses this textual analysis."

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Lien Stripping after *Caulkett* : So Where Are We Now?

FUND ASSEMBLY
MAY 5-7 2016

- Ch. 7
  - No strip down or strip off of voluntary liens as to homestead or non-homestead property unless the claim is disallowed – *Dewsnup, Caulkett*
  - Note: Judicial liens can still be *avoided* (not the same mechanism) to the extent they impair exemptions such as homestead

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Lien Stripping after *Caulkett* : So Where Are We Now?

FUND ASSEMBLY
MAY 5-7 2016

- Ch. 13
  - Wholly unsecured liens on a principal residence can be stripped off in a majority of circuits, including the 11th – *Tanner*
  - No strip down of partially unsecured liens on principal residence – *Nobelman*
  - Liens on non-principal residence can be stripped down if partially unsecured
  - Liens on non-principal residence can be stripped off if wholly unsecured
  - All Ch. 13 lien stripping is contingent on debtor's successful completion of the plan – 11 U.S.C. §1325

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Lien Stripping after *Caulkett*

FUND ASSEMBLY
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So … Would our Ch. 13 PACER example work today?

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PACER

(Public Access to Court Electronic Records)

FUND ASSEMBLY
MAY 5-7 2016

- Motion argues second mortgage "wholly unsecured"

10. The First Mortgage Lender holds a first priority mortgage on the Property in the amount of $251,576.15, per the Proof of Claim filed by the First Mortgage Lender in connection with Debtor's bankruptcy case.

11. The value of the Property pursuant to the professional appraisal attached hereto as **Exhibit B** (and incorporated herein by this reference) is $115,000.00

12. Lender's Second Mortgage claim is a wholly unsecured claim as the amounts of the First Mortgage Lender's secured claims exceed the value of the Property.

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(Public Access to Court Electronic Records)

FUND ASSEMBLY
MAY 5-7 2016

- Motion based on §1322(b) and §506(a) and (d), citing *Folendore*
- *Nobelman* case distinguished

14. A creditor holds a "secured" claim only to the extent of the value of the creditor's interest in collateral. If there is no value, there is no secured claim. 11 U.S.C. Section 506 (a).

15. Lender's Second Mortgage's claim is not protected by 11 U.S.C. Section 1322 (b)(2) and the Supreme Court's decision in Nobelman v. American Savings Bank, 508 U.S. 324, 113 S. Ct. 2106 (1993) as it is wholly unsecured.

16. To the extent that the Lender's Second Mortgage's lien is not securing an allowed secured claim, such lien is void. 11 U.S.C. Section 506 (d), In re: Folendore, 862 F.2d 1537 (11th Cir. 1989).

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(Public Access to Court Electronic Records)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re: Case No. 10-49071-BKC-LMI
Chapter 13

JUAN T DEL ROSARIO
AND JOSEFINA DEL ROSARIO

Debtor(s). /

ORDER GRANTING MOTION TO VALUE AND DETERMINE SECURED STATUS OF LIEN ON REAL PROPERTY HELD BY BANK OF AMERICA NA

THIS CASE came to be heard on November 1, 2011 on the Debtor's *Motion to Value and Determine Secured Status of Lien on Real Property* (DE 86; the "Motion"). Based upon the debtor's assertions made in support of the Motion, without objection, having considered the record in this case, and being duly advised in the premises, the Court FINDS as follows:

Page 1 of 4

LF-92 (rev. 01/08/10)

A. The value of the debtor's real property (the "**Real Property**") located at 1351 NW 117 ST MIAMI FL 33167-3221, and is more particularly described as follows:

LOT 15, BLOCK 3 OF SUNSHINE VILLAGE, ACCORDING TO THE PLAT THEREOF RECORDED IN PLAT BOOK 45, PAGE 17 OF THE PUBLIC RECORDS OF MIAMI-DADE COUNTY, FLORIDA.

is $115,000.00 at the time of the filing of this case.

B. The total of all claims secured by liens on the Real Property senior to the lien of Bank of America NA (the "**Lender**") is $251,149.56.

C. The equity remaining in the Real Property after payment of all claims secured by liens senior to the lien of Lender is $ 0.00 and Lender has a secured interest in the Real Property in such amount.

Consequently, it is **ORDERED** as follows:

1. The Motion is **GRANTED**.
2. Lender has an allowed secured claim in the amount of $ 0.00 .
3. Because Lender's secured interest in the Real Property is $0, Lender's mortgage recorded on April 12, 2006, in OR Book 24420, at Page 1431 of the official records of Miami-Dade County, Florida shall be deemed void and shall be extinguished automatically, without further order of the Court, upon entry of the debtor's discharge in this chapter 13 case. If this case is converted to a case under any other chapter or if the chapter 13 case is dismissed, Lender's mortgage will no longer be considered void and shall be restored as a lien on the Real Property.
4. (Select only one):

___ Lender has not filed a proof of claim in this case. The trustee shall not disburse any payments to Lender unless a proof of claim is timely filed. In

Page 2 of 4

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PACER

(Public Access to Court Electronic Records)

Because Lender's secured interest in the Real Property is $0, Lender's mortgage recorded on April 12, 2006, in OR Book 24420, at Page 1431 of the official records of Miami-Dade County, Florida shall be deemed void and shall be extinguished automatically, without further order of the Court upon entry of the debtor's discharge

If this case is converted to a case under any other chapter or if the chapter 13 case is dismissed, Lender's mortgage will no longer be considered void and shall be restored as a lien on the Real Property.

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Lien Stripping in Bankruptcy: Warning: Title Claim Hazard

- Ch. 13 debtor obtains "recordable order" confirming second mortgage avoided per confirmed Plan
- Title policy issued for new mortgage insured in second position
- Debtor defaults on Plan, converts to Ch. 7
- Consents to vacation of "recordable order"
- Old second mortgage leaps back to life

- Insured second mortgage becomes unsecured third mortgage

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Lien Stripping after *Caulkett*: Open questions

Given its emphasis on deciding *Caulkett* in the context of not being asked to revisit *Dewsnup*, is the Supreme Court open to some day reversing its reading of §506(a) and (d)?

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Lien Stripping after *Caulkett*: Open questions

Might the Supreme court broaden *Nobelman* to find that not even wholly unsecured claims secured only by a principal residence can be stripped off in Ch. 13?

Pre-Caulkett 11th Circuit / majority view (*Tanner):*

- §1322(b)(2) protects the rights of holders of secured claims "secured only by the debtor's principal residence," and
- In *Nobelman, the* Court relied on §506(a) to hold that even partially unsecured claims are also *partially* "secured by the debtor's principal residence,"
- But wholly unsecured claims are not "secured only by a principal residence" at all, and thus are not subject to the anti-modification provisions of §1322(b)(2)

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Lien Stripping after *Caulkett* : Open questions

Might the Supreme court broaden *Nobelman* to find that not even wholly unsecured claims secured only by a principal residence can be stripped off in Ch. 13?

Pre-Caulkett minority view:

- Because *Nobelman* holds that §1322(b)(2) protects the "rights of holders" of secured claims,
- The "rights of the holders" are protected regardless of the value of the secured claim
- So even wholly unsecured claims secured by the debtor's principal residence may not be stripped

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PACER

(Public Access to Court Electronic Records)

Because Lender's secured interest in the Real Property is $0, Lender's mortgage

reco

of M

auto

if the chapter 13 case is dismissed, Lender's mortgage will no longer be consi lered

void and shall be restored as a lien on the Real Property.

So far, courts have seen *Caulkett* as limited to Ch. 7, leaving stripping of wholly unsecured liens in place in Ch. 13, even as to a principal residence.

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Lien Stripping Bonus: What about "Ch. 20?"

- "Ch. 20" is a strategic filing of a Ch. 7 to eliminate unsecured debts, followed by a Ch. 13 to deal with secured debts
- Debtor cannot get a Ch. 13 discharge within 4 years after Ch. 7 discharge
- §1325(a)(5)(B)(i) provides that creditors holding allowed secured claims retain their liens until (1) payment in full under applicable non-bankruptcy law, or (2) discharge.
- A majority of districts, including the 11th Circuit, hold that only plan completion, not discharge, is necessary for Ch. 13 lien-stripping as to wholly unsecured liens in a "Ch. 20."

- So far unchanged after *Caulkett. See, e.g, Turman v. Pinnacle Bank,* (Bankr. D. Neb. June 12, 2015).

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BANKRUPTCY UPDATE: Lien Stripping after *Caulkett*

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FUND ASSEMBLY 2016
IN-DEPTH CLAIMS TOPICS

BREAKOUT TOPIC

Peter M. Armold, North Palm Beach
Mya M. Hachette, Winter Park

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SPEAKER INFORMATION

IN-DEPTH CLAIMS TOPICS

Peter M. Armold

Partner at the Law Firm of Gary Dytrych & Ryan, P.A.

Peter M. Armold is a partner at the Law Firm of Gary Dytrych & Ryan, P.A., in Palm Beach County, where he practices in the area of commercial litigation. Since 1998, Mr. Armold has acted as outside counsel to a number of title insurance companies, including The Fund and Old Republic National Title Insurance Company, handling title insurance claims on behalf of insureds and title insurers.

He earned his Bachelors of Arts Degree from Nova Southeastern University. Mr. Armold received his Juris Doctorate from the Florida State University College of law. He is AV rated as independently determined by Martindale-Hubbell.

Mya M. Hatchette

Shareholder with Winderweedle, Haines, Ward & Woodman's Litigation Department

Mya M. Hatchette is a shareholder with Winderweedle, Haines, Ward & Woodman's litigation department in their Winter Park office. She has been with the firm since 2000 and practices mainly in the areas of complex business and commercial real estate litigation, focusing on business disputes, healthcare compliance issues and disputes, title insurance, construction, and landlord/tenant law.

Responsible for overseeing clients' compliance with controlling rules and regulations, Mya has extensive experience representing insurance companies, business owners, shareholders, physician groups and facilities, national retail tenants, property owners, developers, contractors, and financial institutions in complex litigation matters across the state of Florida. Hatchette – who is admitted to practice in all the Northern and Middle Districts of Florida and all state courts in Florida – also sits on the Recruiting and Marketing Team committees for Winderweedle, Haines, Ward & Woodman.

She is a member of both the state and local bar associations. Mya is also an active Florida-licensed real estate broker, who has served on the board of directors of CREW (Central Florida Chapter of Commercial Real Estate Women) and was recipient of the 2014 CREW Outstanding Achievement award and the 2011 and 2012 CREW President's Award.

She is a frequent lecturer on various legal topics including mortgage fraud, real property litigation and landlord/tenant law.

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FINALITY OF FORECLOSURE JUDGMENTS

I. Right to Appeal Judgment

II. Right to Vacate and Fla. Stat. §702.036

III. Right of Reforeclosure

IV. Statute of Limitations in the Foreclosure Setting

I. Right to Appeal Judgment

A. Fla.R.App.P. 9.030(b) and 9.110

B. Stay required – in the absence of a stay pending appeal, the trial court retains jurisdiction to enforce and carry out a foreclosure judgment that has been appealed. *Mann-Stack v. Homeside*, 982 So.2d 72 (Fla. 2d DCA 2008); *Baker v. Vero Indian River*, 168 So. 536 (Fla. 1936).

C. Fla.R.App.P. 9.310 – stay pending appeal

1. By motion in trial court, discretionary and may be conditioned on a good and sufficient bond (Fla.R.App.P. 9.310(a))

   An ordinary real estate mortgage foreclosure proceeding is, in part at least, other than a money decree, and the automatic provisions of requiring a bond pursuant to Fla.R.App.P. 9.310(b)(1) are inapplicable. *Cerito v. Kovitch*, 406 So.2d 125 (Fla. 4th DCA 1981)

2. Bond, other conditions, or both.
   a. Amount - trial court determines actual sufficiency
   b. Conditions shall include:
      (i) to pay order in full
      (ii) interest, fees
      (iii) depreciation of property
      (iv) others required by trial court. (Fla.R.App.P. 9.310(c))
   c. Stay duration:
      (i) until mandate issues
      (ii) until modified or vacated (Fla.R.App.P. 9.310(e))
   d. Review – motion for review in the appellate court (Fla.R.App.P. 9.310(f))
   e. Discretionary Stay Standard of Review – abuse of discretion. *Mariner Health Care v. Baker*, 739 So.2d 608 (Fla. 1st DCA 1999).
   f. Appellate court authority. The appellate court may issue a stay directly even if the matter has not been presented to the trial court, but the preferred practice is to file a motion for stay in the trial court and then a motion in the appellate court to review the order. *Offerman v. Offerman*,

643 So.2d 1184 (Fla. 5th DCA 1994); *Perez v. Perez*, 769 So.2d 389 (Fla. 3d DCA 1999).

D. Recent Cases/Issues

1. *Rodriguez v. Wells Fargo Bank, N.A.*, 178 So.3d 62 (Fla. 4th DCA 2015) – A servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest, but it must present evidence, such as an affidavit or a pooling and servicing agreement, demonstrating that the real party in interest granted the servicer authority to enforce the note.
2. *Reilly v. U.S. Bank Nat'l Ass'n*, 2016 WL 405337 (Fla. 4th DCA 2016) – Foreclosure action filed by mortgagee against mortgagor was not at issue and, thus, should not have been set for trial; while mortgagee was unable to personally serve mortgagor and, thus, sought to proceed with notice by publication, mortgagee did not obtain default judgment against mortgagor, and mortgagor did not file answer. Trial court's error in setting trial date and proceeding to trial constituted reversible error. West's F.S.A. RCP Rule 1.440.
3. *Chery v. Bank of America, N.A.*, 2016 WL 313998 (Fla. 4th DCA 2016) – Plaintiff alleging standing in a mortgage foreclosure case as a holder must prove it is a holder of the note and mortgage both as of the time of trial and also that the original plaintiff had standing as of the time the foreclosure complaint was filed.
4. *Ensler v. Aurora Loan Services, LLC*, 178 So.3d 95 (Fla. 4th DCA 2015) – Erroneous admission of hearsay consisting of mortgagee's breach letter, payment history, and power of attorney was not harmless in mortgage foreclosure action; mortgage required that notice of breach and opportunity to cure be sent to mortgagor as a condition precedent to filing suit, but the inadmissible hearsay was the only indication that notice was actually sent.
5. *St. Clair v. U.S. Bank Nat'l. Ass'n*, 173 So.3d 1045 (Fla. 2d DCA 2015) – Purported assignee of mortgage failed to prove that it had standing to foreclose as a nonholder in possession of the instrument with the rights of a

holder; although assignee was in possession of the note and mortgage, there was no evidence that it actually acquired the note and mortgage from the original mortgagee.

6. *Clay County Land Trust No. 08-04-25-0078-014-27, Orange Park Trust Services, LLC v. JPMorgan Chase Bank*, 152 So.3d 83 (Fla. 1st DCA 2014) – Current owner of mortgaged property had standing to challenge, on hearsay grounds, summary judgment affidavit of mortgagee's vice-president which was submitted in foreclosure action to establish the amount due on the underlying promissory note, even though current owner was not the borrower; amount owed related to current owner's right of redemption.
7. *Smith v. Reverse Mortg. Solutions, Inc.*, 2015 WL 4257632 (Fla. 3d DCA 2015) – Wife of mortgagor was a co-borrower, and therefore her death or her ceasing to use subject property as principal residence was condition precedent to mortgagee's right to foreclose reverse mortgage; although wife was neither mentioned nor referenced in the promissory note, final portion of mortgage plainly indicated that both wife and her husband were the "borrower" under the mortgage, both wife and husband signed mortgage as "borrower," both husband and wife's signatures were jointly verified by two witnesses and one notary jurat, both borrowers were statutorily protected from foreclosure until both borrowers died, and state constitutional homestead provisions required both parties' signatures on mortgage.
8. *Harper v. HSBC Bank USA, Nat'l. Ass'n*, 148 So.3d 1285 (Fla. 1st DCA 2014) – Genuine issue of material fact as to whether mortgagee, which sent mortgagor a letter notifying her that her mortgage debt had already been accelerated, provided mortgagor with notice of default and an opportunity to cure prior to foreclosing and accelerating the debt as required by the promissory note and mortgage, precluded summary judgment on mortgagee's foreclosure claim.

II. Right to Vacate and Fla. Stat. §702.036

A. Right to Vacate

1. Fla. Stat. §702.07
   a. Jurisdiction in Circuit Court
   b. Does not create independent grounds
      Toler v. BOA, 78 So.3d 699 (Fla. 4th DCA 2012)
   c. Jurisdiction even after sale
      Sterling Factors Corp. v. US Bank, 968 So.2d 658 (Fla. 2nd DCA 2007)
2. Rule 1.540 Fla.R.Civ.P.
   a. Exclusive GROUNDS for Motion for Relief
      (1) Subject to one-year limit
         (a) mistake, inadvertence, surprise or excusable neglect
            i. lender's failure to reform legal description
            ii. excusable neglect, failure of Defendant's attorney to appear at summary judgment hearing, and meritorious defense, lack of standing where lender had no evidence of being holder. *Gascue v. HSBC Bank*, 97 So.3d 263 (Fla. 4th DCA 2012)
            iii. excusable neglect, failure of Defendant's attorney to appear at summary judgment hearing due to calendaring mistake and meritorious defense, failure to comply with forbearance agreement and notice. *Acosta v. Deutsche Bank*, 88 So.3d 415 (Fla. 4th DCA 2012)
         (b) newly discovered evidence
         (c) fraud (intrinsic or extrinsic)
            i. the ground of misrepresentation or fraud, nor any other ground was stated when mortgagor moved for relief based upon fact he had been trying to renegotiate his loan and lender had represented it could be worked out. *Salazar v. HSBC Bank*, 158 So.3d 699 (Fla. 3d DCA 2015)
            ii. Mortgagors failed to establish they were prevented from presenting their case, kept away from court, or falsely promised

a compromise and filed motion too late (3 years after judgment). *Voce v. Wachovia*, 174 So.3d 545 (Fla. 4th DCA 2015)

iii. Debtors cured default in accordance with mediated settlement agreement's terms so as to preclude entry of ex parte final judgment of default; creditor swore that debtors had not made any payment and refused to make further payments, despite the fact that the creditor had received the specified default payment four days prior to the filing of his motion for ex-parte final judgment of default and within the five-day cure period, which constituted a misrepresentation that should have resulted in the vacatur of the final judgment. *Aboumahboub v. Honig*, 182 So.3d 682 (Fla. 4th DCA 2015)

(2) No specific time limit

(a) void

i. not available as grounds for lender's failure to reform legal description in mortgage carried into judgment, absent any evidence there was an owner of described property other than owner listed in complaint or that the property, as described in mortgage and judgment even existed. *Epstein v. BOA*, 162 So.3d 159 (Fla. 4th DCA 2015).

ii. lack of standing when foreclosure filed makes judgment merely voidable. *Everhome Mortgage Co. v Janssen*, 100 So.3d 1239 (Fla. 2d DCA 2012).

iii. no notice of trial at which foreclosure judgment entered. *Mendoza v. Chase*, 126 So.3d 350 (Fla. 3d DCA 2013).

iv. never served with process in foreclosure. *Montes-Mustira v. Aurora Loan*, 98 So.3d 778 (Fla. 4th DCA 2012) (entitled to evidentiary hearing).

v. Mortgagee entitled to relief from dismissal when no notice of trial date was given and parties failed to appear at trial. *Wells Fargo v. Michaels*, 166 So.3d 226 (Fla. 5th DCA 2015).

vi. Fee Simple title holder was indispensable party in action to foreclose mortgage on property, and therefore foreclosure judgment obtained against mortgagor in proceedings in which record title owner was not a party was void. *Citibank, N.A. v. Villanueva*, 174 So.3d 612 (Fla. 4th DCA 2015).

(b) satisfied, relieved, revised or no longer equitable. . . prospective application

i. available as grounds for lender's failure to reform legal description in the mortgage carried into judgment. *Wells Fargo v. Giesel*, 155 So.3d 411 (Fla. 1st DCA 2014); *Lucas v. Barnett Bank*, 705 So.2d 115 (Fla. 2d DCA 1998).

ii. failure to grant relief prevents parties from concluding settlement. *Wells Fargo v. Giglio*, 123 So.3d 60 (Fla. 4th DCA 2013).

(c) Fraud upon the court. (1.540(b) generally)

b. All grounds subject to "Reasonable Time" requirement. (Rule 1.540(b), Fla.R.Civ.P.)

c. May be by independent action (Rule 1.540(b), Fla.R.Civ.P.)

d. Motion or independent action filing does not affect or suspend finality. (Rule 1.540(b), Fla.R.Civ.P.)

e. Standard of review of ruling abuse of discretion. *Wells Fargo v. Giglio*, 123 So.3d 60 (Fla. 4th DCA 2013)

f. Filing of an appeal does not toll one year limitation *Seven-Up Bottling Company v. George Construction Corp.*, 153 So.2d 11 (Fla. 3d DCA 1963)

g. Rehearing unavailable - Trial court cannot sua sponte grant rehearing of its order denying motion. *Hebrick v. Wells Fargo*, 2014 WL 1665741 (Fla. 1st DCA 2014)

h. If granted - Mortgage with lien and debt is fully restored (Fla. Stat. §702.08)

B. Fla. Stat. §702.036
   1. Applicability. Part of “Florida Law Foreclosure Act” – 1 to 4 dwelling unit
   2. Purpose. Certainty for title examiners
   3. Required Conditions for shielding from post judgment relief
      a. Mortgagors were properly served;
      b. Final judgment was entered;
      c. Appeals period ran or appeal resolved;
      d. Property acquired for value by one not affiliated with lender or prior owner; and
      e. no Lis Pendens regarding action to challenge judgment.
   4. Even actual Note and Mortgage Holder cannot foreclose thereafter.
   5. Request shall be treated solely as claim for monetary charges against foreclosing lender.
   6. Does not limit other relief that does not adversely affect title.
   7. Who is affiliated with the foreclosing lender
      a. Lender or loan servicer for the loan;
      b. Past or present owner or holder of the loan;
      c. Maintenance, holding, foreclosure services company or law firm under contract with the above as to the loan;
      d. Parent, subsidiary or other that controls or is controlled by the above.
   8. Applies to all mortgages and notes secured thereby executed before or after effective date (June 7, 2013)
   9. No reported case law interpreting statute (as of March 20, 2016)
   10. Session Law Chapter 2013-137 (HB87) - refers to a “collateral” action as opposed to “any action or proceeding,” which is the language in the statute.

III. Right of Reforeclosure

A. Foreclosure ineffective as to interested party either
   1. not joined in action; or,
   2. not eliminated by operation of L.P. statute, Fla. Stat. §48.23. Q*uinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 690 (Fla. 1930)

B. Omitted Party – has right of redemption.
   1. Owner's Redemption – right to satisfy debt secured, and redeem the property, itself
   2. Lienor's Redemption - right to satisfy a prior mortgage by payment of debt it secures and subrogation to foreclosing lender. *Glendale Federal v. Guadagnino*, 434 So.2d 54 (Fla. 4th DCA 1983)
   3. Redemption Amount is debt at time of foreclosure (not judgment) *Quinn*, at 693.

C. Reforeclosure by Mortgagee or Successor in Interest. *Trueman Fertilizer Co. v. Lester*, 20 So.2d 349 (Fla. 1944)

D. Remedies
   1. Part of prior foreclosure
      a. Specific reservation of jurisdiction required. *Ross v. Wells Fargo*, 114 So.3d 256 (Fla. 3d DCA 2013) (without prejudice to file a new foreclosure action adding the omitted party)
   2. New Action

E. Types of Reforeclosures
   1. Lienors – only new land search required
   2. Ownership Interests – both land search and judgment search of owners necessary

F. Procedures
   1. Lienors
      a. Order requiring defendant(s) to exercise right of redemption within certain time
      b. Final judgment extinguishing lien, if redemption not timely executed

c. New sale could be required if lienor was deliberately omitted. *Quinn*, at 692, 693.

2. Owners

a. Final judgment with new sale date

b. Certificate of Sale and Certificate of Title

Notice should qualify interest of owner, if less than fee simple

G. Appeals

The final judgment of reforeclosure is subject to the 30 day right of appeal under Fla.R.App.P. 9.030 (b) and 9.110.

H. Limitations Period

There is no applicable limitation period on commencing a reforeclosure action.

IV. Statute of Limitations in the Foreclosure Setting

A. Rules, Rules and more Rules…..

1. F.S. 95.11(2)(c) – an action to foreclose a mortgage must be commenced within 5 years **of the event that gives rise to the cause of action**
2. F.S. 95.281 (1)(a) – Statute of Repose – if final maturity of the obligation that is secured by a mortgage is ascertainable from record of it, the lien of a mortgage shall terminate 5 years from the stated date of maturity
   a. F.S. 95.281 - establishes the ultimate date that a lien of the mortgage terminates and is no longer enforceable *Houck Corp. v. New River, Ltd.*, 900 2d 601 (Fla. 2d DCA 2005)
3. Rule 1.420(a), Florida Rules of Civil Procedure - Except in actions in which property has been seized or is in the custody of the court, an action, a claim, or any part of an action or claim may be dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment
4. Rule 1.420(b), Florida Rules of Civil Procedure - Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court.

B. The Issues in the Spotlight

1. Foreclosure action filed with allegation of acceleration of the balance of the loan. Foreclosure action dismissed either voluntarily or involuntarily. Bank subsequently re-files for foreclosure 7 years later. Is this action time barred? Can the accrual of SOL be undone by reinstatement of the original installment terms or dismissal of the foreclosure complaint?
2. Lender's position:
   a. Dismissal either voluntarily or involuntarily acts a deceleration
   b. No acceleration until adjudication that mortgage was accelerated so there is "no event" that triggers SOL (query is there ever a SOL argument that can be made?)

c. The remedy of foreclosure under F.S. 95.11 is separate and apart from F.S. 95.281. Dismissal reset F.S. 95.11(c)(2). Defaults over 5 years under F.S. 95.281 are barred but it doesn't preclude action on future defaults. Rather, each default stands on its own.

d. What is Deceleration? - the act of undoing a mortgage note's acceleration and the accrual of the limitations period to return the lending relationships to the status quo of an installment agreement maturing in the distant future.

3. Borrower's position:

a. Notice of acceleration by either written default by bank or filing of foreclosure action cannot be undone by dismissal. The five year time period continues to accrue.

b. Notice of acceleration moves up time period of five years under F.S. 95.281 to collect on debt secured.

c. Each default does not stand on its own once note has been accelerated.

C. Relevant Case Law

1. *Greene v. Boyette*, 587 So.2d 629 (Fla. 1st DCA 1991) - suit for one installment payment does not preclude suit for a later installment

2. *Singleton v. Greymar Assocs.*, 882 So.2d 1004 (Fla. 2004) – involuntary dismissal with prejudice did not preclude a later foreclosure action based upon later defaults under note and mortgage based upon principles of *res judicata*

a. New defaults present new causes of action

b. *"Subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action."*

3. *Dorta v. Wilmington Trust Nat'l Ass'n*, 2014 WL 1152917 (M.D. Fla. 2014) – involuntary dismissal without prejudice for lack of prosecution did not bar later foreclosure action after 5 years had run from time of first foreclosure

4. *Kaan v. Wells Fargo Bank, N.A*., 2013 WL 5944074 (S.D. Fla. 2013) – the note and mortgage were still enforceable and plaintiff could file a new

foreclosure action based upon default of any payment owed within the five year payment plan

5. *US Bank Nat'l Ass'n v. Bartram*, WL 1632138 (Fla. 3d DCA 2014) – each subsequent default created a new and independent right to accelerate on the note and file a new foreclosure action that is not barred by the SOL – first time that a Florida appellate court had explicitly held that each default triggered a new cause of action for foreclosure
6. *Evergrene Partners v. Citibank N.A.*, 143 So. 3d 954 (Fla. 4th DCA 2014) – because acceleration and/or default were not adjudicated, the subsequent foreclosure not barred by SOL – certified conflict with *Beauvais*
7. *Deutsche Bank Trust Company Americas v. Beauvais, et al.,*(Fla. 3d DCA 2014) – the acceleration of the mortgage debt triggered the start of the statute of limitations; because the initial dismissal was **without prejudice** and therefore no adjudication on its merits, the involuntary dismissal did not decelerate lender's acceleration of note and mortgage; the acceleration of the debt remained in place with the entire balance of the debt being due; without any new payment due, there could be no new default and therefore the second foreclosure action was barred by SOL

D. Supreme Court - *Bartram* – oral arguments November 2015

1. **Certified Question**: Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit?
2. Lender – dismissal, regardless of whether with our without prejudice resets mortgage; no acceleration until final judgment of foreclosure; to allow otherwise would give borrower a windfall
3. Borrower - Strict 5 year statute of limitations for foreclosure - all payments due start the running of acceleration; however, there can be a waiver by

borrower by starting to make payments again – then debt reinstated along with SOL

4. Cautionary procedures to implement until a decision is made
   a. Important point about the *Beauvais* opinion – the Court expressly held that the subject mortgage lien was **not** null and void. F.S. 281(1)(a) is still applicable and with the subject mortgage having a maturity date of March 1, 2036, mortgage lien remains valid until March 1, 2041. Leave open the door to send a new default notice and base new foreclosure on a subsequent default.
      i. Affirmative acts for lenders to try: send a new default notice, notice of deceleration, new monthly payment statements, etc.

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FUND ASSEMBLY 2016

MARKETING AND THE UNLAWFUL INDUCEMENT RULE

BREAKOUT TOPIC

Gregory R. Cohen, Partner at Cohen Norris Wolmer Ray Telepman & Cohen

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SPEAKER INFORMATION

MARKETING AND THE UNLAWFUL INDUCEMENT RULE

Gregory R. Cohen
Partner at Cohen Norris Wolmer Ray Telepman & Cohen

Gregory R. Cohen is a partner in the law firm of Cohen Norris Wolmer Ray Telepman & Cohen. He earned his B.A. degree from the University of Miami and his J.D. degree from University of Miami School of Law. Mr. Cohen's practice areas include residential and commercial real estate and loan transactions, including a focus on short sales and commercial workouts, issuance of title insurance, business transactions and development transactions. Furthermore, his clients consist of sellers and purchasers of residential and commercial real estate, businesses, institutional lenders on commercial and residential loan transactions, real estate agents, title insurance underwriters regarding transactional work and claims work, builders, developers, and landlords and tenants regarding residential and commercial lease transactions.

Mr. Cohen is presently serving as the Chairman of the Real Estate Committee of the Palm Beach County Bar Association. He has lectured to various professionals involved in real estate, including surveyors, real estate agents and other lawyers for approved Florida Bar CLE credits. Mr. Cohen is Board Certified in Real Estate by the Florida Bar. He has further authored the book "4L: The Class Never Taught in Law School."

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MARKETING AND THE UNLAWFUL INDUCEMENT RULE SEMINAR

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I. INTRODUCTION

A. Who am I?

B. Wrote a book: 4L: The Class Never Taught in Law School

1. Transition into the real world

2. Creating Business

II. WHAT IS THE GOAL OF THE SEMINAR – ALWAYS LEARN ONE THING

III. EVERYTHING YOU DO IS MARKETING

A. Everything you do, everything you say, everything you wear, the way you talk and even the way you type your e-mails is marketing. Business Development is 100% of the time.

B. What you do affects how another person may deal with you in the future, determines if they want to continue dealing with you at all, determines if they are hiring you, or if they maintain an ongoing relationship or simply stand as a referral source.

IV. WHY MARKET?

A. You create value for everyone: (i) your law firm; (ii) you; and (iii) your clients.

V. MARKETING IS NOT FOR EVERYONE

A. Minders

B. Grinders

C. Finders

VI. HOW DO YOU MARKET? GOOD STARTING POINT IS UNDERSTANDING WHY PEOPLE HIRE ATTORNEYS

A. Attorneys Everywhere

B. Connections/Personal to the attorney (Like you?)

C. Lose the Ego

D. Listen

E. Attitude and Delivery

VII. WHEN AND WHERE CAN YOU MARKET

A. Meals

B. Driving

C. Miscellaneous

1. Functions
2. Dinner Groups
3. Inns of Court
4. Tournaments
5. Seminars
6. Religious Events
7. Sports
8. Kids
9. Charities

VIII. WHO CAN BECOME A CLIENT?

- A. Everyone
- B. Direct Referrals (Give)
- C. Indirect Referrals (Give)
- D. Friends

IX. GIVE BUSINESS

X. ADDITIONAL IDEAS

- A. Frequent the Same Place
- B. Be On Everyone's Mind (Follow up)
- C. Dictaphone

XI. MISCELLANEOUS

- A. This Seminar
  1. Conflicts
  2. Different Cities
- B. Talk to People
- C. Give and be a good person
- D. Refreshers
- E. Final Thoughts

XII. UNLAWFUL INDUCEMENT RULE

69B-186.010 Unlawful Inducements Related to Title Insurance Transactions.

(1) The purpose of this rule is to interpret subparagraph 626.9541(1)(h)3., F.S., which provides that it is an unfair method of competition and unfair or deceptive act or practice prohibited by Section 626.9521, F.S., to engage in certain activities related to title insurance.

(2) All lists contained within this rule are intended as examples and are not exhaustive. This rule does not prohibit inducements or rebates provided by filed or approved rates or rating manuals, advertising gifts allowed by paragraph 626.9541(1)(m), F.S., or inducements and rebates otherwise expressly allowed by law.

(3) For purposes of this rule, the term "referrer of settlement service business" means any person who is in a position to refer title insurance business incident to or part of a real estate transaction, or an associate of such person. A referrer of settlement service business may be a title insurance agent, title insurance agency, title insurance company, attorney, real estate broker, real estate agent, real estate licensee, broker associate, sales associate, mortgage banker, mortgage broker, lender, real estate developer, builder, property appraiser, surveyor, escrow agent, closing agent, or any other person or entity involved in a real estate transaction for which title insurance could be issued; or any employee, officer, director, or representative of such a person or entity.

(4) As they relate to the transaction of title insurance, the following activities, whether performed directly or indirectly, for or by any referrer of settlement service business, are inducements for the sale, placement or referral of title insurance business in violation of Section 626.9521 and subparagraph 626.9541(1)(h)3., F.S.:

(a) Facilitating any discount, reduction, credit, or paying any fee or portion of the cost of an inspection, inspection report, appraisal, or survey, including wind inspection, to a purchaser or prospective purchaser of title insurance.

(b) Providing membership in any organization, society, association, guild, union, alliance or club at a discount, reduced rate, or at no cost to a referrer of settlement service business.

(c) Making or offering to make a charitable or other tax-deductible contribution on behalf of the purchaser or prospective purchaser of title insurance.

(d) Providing or offering stocks, bonds, securities, property, or any dividend or profit accruing or to accrue thereon to a referrer of settlement service business. However, the use of lawful affiliated business arrangements that are permitted under the Federal Real Estate Settlement Procedure Act would not violate this subparagraph and would be allowable under paragraph (2) of this rule.

(e) Providing or offering employment to a referrer of settlement service business in exchange for the purchase of title insurance.

(f) Providing or paying for the printing of bulletins, flyers, post cards, labels, etc. that promote the business of a referrer of settlement service business.

(g) Furnishing or paying for the furnishing of office equipment (fax machines, telephones, copy machines, etc.) to a referrer of settlement service business.

(h) Providing or paying for cellular telephone contracts for a referrer of settlement service business.

(i) Providing simulated panoramic home and property tours to real estate brokers or real estate sales associates that they utilize to promote their listings.

(j) Providing or paying for gift cards or gift certificates to or for a referrer of settlement service business or to a purchaser or prospective purchaser of title insurance.

(k) Sponsoring and hosting, or paying for the sponsoring and hosting, of open houses for real estate brokers or real estate sales associates to promote their listings.

(l) Providing or paying for food, beverages, or room rentals at events designed to promote the business of a referrer of settlement service business other than the title insurance agent or agency.

(m) Paying advertising costs to advertise and promote the listings of real estate brokers or real estate sales associates via publications, signs, emails, websites, web pages, banners, or other forms of media.

(n) Providing an endorsement, designation of preferred status, approved status, or featured partner status on publications, signs, emails, websites, web pages, banners or other forms of media promoting the business of real estate brokers or real estate sales associates.

(o) Paying a referrer of settlement service business to fill out processing (order) forms in exchange for title insurance contracts.

(p) Providing "leads" or mailing lists to or on behalf of a referrer of settlement service business at no cost or a reduced cost.

(q) Entering into any arrangement to provide unearned compensation to a referrer of settlement service business.

(r) Providing, or offering to provide, non-title services, without a charge that is commensurate with the actual cost, to a referrer of settlement service business.

(5) Except as prohibited by Section 626.9541, F.S., expenditures for the following are not in violation of Section 626.9521 and subparagraph 626.9541(1)(h)3., F.S., or in violation of this rule:

(a) Promotional items with a company logo of the title insurance agent or agency, with a value not to exceed the amount allowed by paragraph 626.9541(1)(m), F.S., per item. "Promotional item" does not include a gift certificate, gift card, or other item that has a specific monetary value on its face, or that may be exchanged for any other item having a specific monetary value.

(b) Furnishing educational materials, such as fliers, brochures, pamphlets, or Frequently Asked Question sheets, exclusively related to title insurance for a referrer of settlement service business that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by a referrer of settlement service business.

(c) Compensation paid to a referrer of settlement service business for goods and services actually performed at amounts not exceeding the reasonable fair market value of the goods and services and that is not intended to induce the referral of title insurance business.

(d) Any advertising or marketing activities that directly promote the title insurance business of the title insurance agent or agency, which may include joint participation in marketing with another party provided that the agent or agency pays the proportionate share or fair market value of the costs, and does not violate (5)(a) of this rule.

(e) A payment by a title insurance company to its duly appointed agent for services actually performed in the issuance of a title insurance policy.

(f) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

Rulemaking Authority 624.308(1), 626.9611 FS. Law Implemented 626.9521, 626.9541(1)(h), (m), 626.9611 FS. History – New.

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

February 5, 2016

Honorable Representative John Wood
303 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

RE: Rule 69B-186.010, Florida Administrative Code
Unlawful Inducements Related to Title Insurance Transactions

Honorable Chair Wood:

The Department of Financial Services' interpretation of subparagraph 626.9541(1)(h)3., Florida Statutes, and subsection 69B-186.010(4)(a), Florida Administrative Code, is that the advanced payment by a title insurance agent and/or agency for an estoppel certificate out of the funds of the agent or agency would be an inducement to title insurance and therefore a violation of the Florida Insurance Code.

We believe that this prohibition is already included within Rule 69B-186.010, F.A.C., which was recently promulgated and will go into effect on February 9, 2016. However, in an abundance of clarity to the Florida Legislature and the real estate industry, we anticipate beginning rulemaking proceedings to amend the rule to include the advanced payment by a title insurance agent and/or agency for an estoppel certificate out of the funds of the agent or agency as an unlawful inducement.

If you have questions, please do not hesitate to contact me.

Sincerely,

Greg Thomas

FLORIDA DEPARTMENT OF FINANCIAL SERVICES
GREGORY M. THOMAS, CPCU, CLU, FLMI, CPM, ASLI, AIC, ACS • DIRECTOR
DIVISION OF AGENT AND AGENCY SERVICES
200 EAST GAINES STREET, SUITE 416 C• TALLAHASSEE, FLORIDA 32399-0318
PHONE (850) 413-5401 • FAX (850) 922-3905 • EMAIL: GREG.THOMAS@MYFLORIDACFO.COM
Affirmative Action • Equal Opportunity Employer

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

February 11, 2016

Honorable Representative John Wood
303 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

RE: Rule 69B-186.010, Florida Administrative Code
Unlawful Inducements Related to Title Insurance Transactions

Honorable Chair Wood:

This is in follow up to my letter of February 5, 2016. The February 5th letter generated a significant amount of discussion which prompted the Department of Financial Services (Department) to further review this matter. After further analysis, the Department believes the information provided in the letter is correct; however, the information is incomplete. The beginning paragraph of the letter properly addressed inducements but should have continued to place them in the context of "Unlawful Rebates."

The Department believes that it is a violation of subparagraph 626.9541(1)(h)3., Florida Statutes, and subsection 69B-186.010(4)(a), Florida Administrative Code, for a title insurance agent and/or agency to pay for an estoppel certificate without being reimbursed for the expenditure. However, if a title insurance agent and/or agency pay for an estoppel certificate, and the title insurance agent or agency is reimbursed at closing for the estoppel certificate, such advance payment for the estoppel certificate does not constitute an "unlawful rebate." As previously indicated, we intend to begin the rule revision process to clarify this prohibition within Rule 69B-186.010, Florida Administrative Code.

If you have questions, please do not hesitate to contact me.

Sincerely,

Greg Thomas

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Compliance Information

Title Insurance Agents

ESCROW FUND ACCOUNTABILITY

Rule 69O-186.008 F A C prohibits you or your title insurer from endangering the funds entrusted to you through the escrow process The Florida Statutes provide detailed directions as to the types of accounts and investments that may be used for escrow accounts These requirements are the same for the entire day, not just during business hours Section 626.8473(3) F S states the funds must be immediately placed in a financial institution that is a member of the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Share Insurance Fund (NCUSIF). This means the funds may be invested in any type of investment that meets the requirements of section 17.57, F S , as long as it is an account that is maintained with a member of the FDIC or the NCUSIF

REBATES AND UNLAWFUL INDUCEMENTS

Title agents and agencies are permitted to rebate all or part of their share of the title insurance premium as the result of a Florida Supreme Court decision in the case of Chicago Title Insurance Company v. Butler, No. 95312 (Fla. Oct. 19, 2000) This decision allows a title insurance agent or agency to rebate any portion of the agent s share of the premium to the person responsible for paying that premium However a rebate may not be provided to any third party as an inducement for the referral of business to the title insurance agent or agency

The Department believes that it is a violation of subparagraph 626 9541(1)(h)3 Florida Statutes and subsection 69B-186 010(4)(a) Florida Administrative Code for a title insurance agent and/or agency to pay for an estoppel certificate without being reimbursed for the expenditure However, if a title insurance agent and/or agency pay for an estoppel certificate, and the title insurance agent or agency is reimbursed at closing for the estoppel certificate such advance payment for the estoppel certificate does not constitute an "unlawful rebate " We intend to begin the rule revision process to clarify this prohibition within Rule 69B-186 010, Florida Administrative Code

Rule 69B-186.010, F A C , became effective on February 9 2016 It covers Unlawful Inducements Related to Title Insurance Transactions The purpose of this rule is to interpret subparagraph 626 9541(1)(h)3 , F S , which provides that it is an unfair method of competition and unfair or deceptive act or practice prohibited by Section 626 9521, F S , to engage in certain activities related to title insurance All lists contained within this rule are intended as examples and are not exhaustive This rule does not prohibit inducements or rebates provided by filed or approved rates or rating manuals, advertising gifts allowed by paragraph 626 9541(1)(m), F S or inducements and rebates otherwise expressly allowed by law

RECORDS

GENERAL RECORDS

Title agents must maintain records for 7 years pursuant to section 627.7845(2) F S which states:

"The title insurer shall cause the evidence of the determination of insurability and

the reasonable title search or search of the records of a Uniform Commercial Code filing office to be preserved and retained in its files or in the files of it s title insurance agent or agency for a period of not less than 7 years after the title insurance commitment, title insurance policy or guarantee of title was issued The title insurer must produce the evidence required to be maintained by this subsection at its offices upon the demand of the office Instead of retaining the original evidence, the title insurer may, in the regular course of business, establish a system under which all or part of the evidence is recorded copied, or reproduced by any photographic photo static microfilm micro card miniature photographic, or other process which accurately reproduces or forms a durable medium for reproducing the original "

Contractual agreements between the title agent and the insurer that require the agent to maintain such records are NOT regulated by the bureau

ESCROW RECORDS

Escrow Account records must be maintained in accordance with rule 690-186.009, F A C states "Every licensed title insurance agent shall maintain a monthly reconciliation of every escrow account required to be maintained pursuant to section 626.8473, F S , and shall, on a monthly basis, report such reconciliation together with appropriate supporting documentation to each title insurer which licensed the agent during the reconciliation period The reconciliation shall be supported by appropriate documentation including a monthly bank statement, a list of all outstanding checks as of the date of the reconciliation which is not shown on the monthly bank statement, and a trial balance of the escrow ledger records required to be maintained by subsection (2) Licensed title insurance agents and title insurers shall provide a copy of the monthly escrow account reconciliation to the Office upon Its request Such records shall be maintained by the title insurer for a period of five years " Also part (2) states 'Every licensed title insurance agent shall maintain a separate ledger card for each real estate closing transaction for which funds are received in escrow The ledger card shall contain chronological entries of dates and amounts of moneys received and disbursed including the name of the remitter and payee and each check number issued on such escrow account Such records shall be maintained by the title insurance agent for a period of three years The ledger card required by this rule may be maintained in computer storage with a print-out available upon request of a title insurer or the Office of Insurance Regulation (OIR)

REFERRAL FEES

The Florida Statutes prohibit title insurance agents and agencies from paying, allowing, giving or offering to pay allow or give a direct or indirect inducement for the purchase of title insurance Paying someone for each piece of business they send to you could be considered an inducement which would be a violation of the statutes See subsection 626.9541(1)(h)3.a. F S This section does include paying employees of the title agency who are not licensed and appointed as title insurance agents An example would be a title insurance agency that pays a marketing representative who is not licensed for each title insurance policy sold

Back to Speaker Topics

FUND ASSEMBLY 2016

NEW MEMBER Q&A

BREAKOUT TOPIC

Maggie Thumberg, Fund Sr. Underwriting Counsel & Legal and Branch Education Manager

Back to Speaker Topics

SPEAKER INFORMATION

NEW MEMBER Q&A

Maggie Thumberg
Fund Sr. Underwriting Counsel & Legal and Branch Education Manager

Margaret Atkins Thumberg received her B.A. degree in history from the University of South Florida and her M.A. degree in history and J.D. degree from the University of Florida.

Ms. Thumberg is a Florida Bar Board Certified Real Estate Lawyer and has also been admitted to practice in the United States District Court for the Southern District of Florida. While at The Fund, she has presented hundreds of live seminars and Fundinars, including the New Member Training Program and has been a speaker at the 2011 and 2012 Affiliate Assemblies.

Ms. Thumberg is also the co-editor of The Fund's monthly publication, The Fund Concept. Prior to joining The Fund, she focused her practice in real estate and corporate matters including representation of lenders and developers in financing and acquisition matters and borrowers in foreclosure defense and bankruptcy.

Through Ms. Thumberg's representation of non-profit affordable housing developers, she prepared a practical guide to mortgage foreclosure mitigation counseling and presented numerous seminars on foreclosure related topics, including the Truth-in-Lending Act and Home Affordable Modification Program. Ms. Thumberg has also published an article on the Freedom of Information Act.

FUND ASSEMBLY
MAY 5-7 2016

NEW MEMBER Q&A

"Sharpening Your Superpowers"

Maggie Thumberg
Sr. Underwriting Counsel,
Legal & Branch Education Manager

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Working with Underwriting Counsel

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The Major Transaction

More than $1 Million

FUND ASSEMBLY
MAY 5-7 2016

When Ordering a Branch Product

- Make sure the Branch knows the policy is for more than $1 Million (Owner's or Lender's)
- Commitment will be "pre-approved" by Underwriting Counsel prior to delivery
- Exactly $1 Million – no approval required
- Other obligations for you

The Major Transaction

More than $1 Million

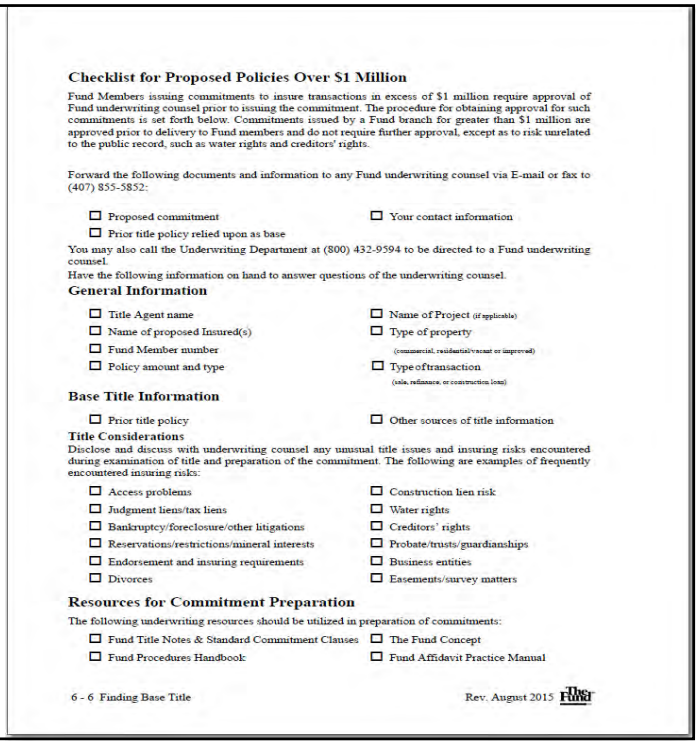
FUND ASSEMBLY
MAY 5-7 2016

When Preparing Your Own Commitment

- Checklist for Proposed Policies Over $1 Million
- Contact Underwriting Department for approval

The Major Transaction

More than $1 Million



Checklist for Proposed Policies Over $1 Million

Fund Members issuing commitments to insure transactions in excess of $1 million require approval of Fund underwriting counsel prior to issuing the commitment. The procedure for obtaining approval for such commitments is set forth below. Commitments issued by a Fund branch for greater than $1 million are approved prior to delivery to Fund members and do not require further approval, except as to risk unrelated to the public record, such as water rights and creditors' rights.

Forward the following documents and information to any Fund underwriting counsel via E-mail or fax to (407) 855-5852:

- ☐ Proposed commitment
- ☐ Your contact information
- ☐ Prior title policy relied upon as base

You may also call the Underwriting Department at (800) 432-9594 to be directed to a Fund underwriting counsel.

Have the following information on hand to answer questions of the underwriting counsel.

General Information

- ☐ Title Agent name
- ☐ Name of Project (if applicable)
- ☐ Name of proposed Insured(s)
- ☐ Type of property (commercial, residential/vacant or improved)
- ☐ Fund Member number
- ☐ Policy amount and type
- ☐ Type of transaction (sale, refinance, or construction loan)

Base Title Information

- ☐ Prior title policy
- ☐ Other sources of title information

Title Considerations

Disclose and discuss with underwriting counsel any unusual title issues and insuring risks encountered during examination of title and preparation of the commitment. The following are examples of frequently encountered insuring risks:

- ☐ Access problems
- ☐ Construction lien risk
- ☐ Judgment liens/tax liens
- ☐ Water rights
- ☐ Bankruptcy/foreclosure/other litigations
- ☐ Creditors' rights
- ☐ Reservations/restrictions/mineral interests
- ☐ Probate/trusts/guardianships
- ☐ Endorsement and insuring requirements
- ☐ Business entities
- ☐ Divorces
- ☐ Easements/survey matters

Resources for Commitment Preparation

The following underwriting resources should be utilized in preparation of commitments:

- ☐ Fund Title Notes & Standard Commitment Clauses
- ☐ The Fund Concept
- ☐ Fund Procedures Handbook
- ☐ Fund Affidavit Practice Manual

6 - 6 Finding Base Title — Rev. August 2015

Access Problems

FUND ASSEMBLY
MAY 5-7 2016

- Nothing on commitment to remind you to check access
- Consider adding access to your closing checklists
- TN Chapter 3

Access Problems

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MAY 5-7 2016

Access Checklist

- Plat
- Survey
- Unpaved road
- Governmental maps
- Documents (easements)
- Limitations
- Gates
- Inquiry of the parties
- Unadjudicated access
- Railroad crossings
- Prior policies

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Judgment Liens & Tax Liens

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Judgment Liens

- Generally, must be paid off if they attach
- TN Chapter 18

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Judgment Liens & Tax Liens

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MAY 5-7 2016

When Do Judgment Liens Attach?

- Certified copy recorded
- Address of creditor or address affidavit
- Statutory period

- Sec. 55.10, F.S.
- Knox's Judgment Lien Paradigm

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Judgment Liens & Tax Liens

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Common Ways Around the Judgment Lien

- Continuous Marriage Affidavit
- "Not my seller!" – Non-Identity Affidavit
- Homestead

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Judgment Liens & Tax Liens

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Judgment Liens Not Yet Perfected

- Over $1 Million Policy
  - Escrow amount needed to payoff judgment and wait until gap is closed to release

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Judgment Liens & Tax Liens

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Judgment Liens Not Yet Perfected

- $1 Million and Under
  - Over a year old
    - Can ignore
  - Less than a year old
    - Escrow funds until confirmation gap is covered

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Judgment Liens & Tax Liens

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Federal Tax Liens

- Duration
- Entireties
- Release from IRS

Bankruptcy, Foreclosure, Other Litigation

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- Obligation to examine proceedings

Bankruptcy, Foreclosure, & Other Litigation

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Bankruptcy

- Examine bankruptcy
  - Property is no longer part of the bankruptcy estate
  - Action taken in relation to the property during the time of the bankruptcy was approved by the bankruptcy court

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Bankruptcy, Foreclosure, Other Litigation

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Bankruptcy

- When seller is currently debtor in bankruptcy, property must be released:
  - Abandonment
  - Exempt homestead property
  - Any action taken approved by bankruptcy court

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Bankruptcy, Foreclosure, & Other Litigation

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Foreclosure

- Legal descriptions
- Junior lienors
- Open litigation

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Reservations, Restrictions, Mineral Interests

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- Carefully examine documents
- Can appear anywhere! Especially older documents

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Reservations, Restrictions, Mineral Interests

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Reservations & Restrictions

- Marketable Record Title Act

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Reservations, Restrictions, Mineral Interests

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Automatic Mineral and Petroleum Reservations in Public Lands

- Sec. 270.11, F.S.
- Reservation of undivided ¾ interest in all phosphate, minerals, and metals
- Reservation of undivided ½ interest in all petroleum
- Under land conveyed from TIIF, local government, water management district, other state agency
- Reservation is automatic and does not need to be stated

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Reservations, Restrictions, Mineral Interests

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Mineral Rights

- Reservation may not be eliminated by MRTA
- Right of entry may be eliminated by MRTA
- "without right of entry"

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Endorsement & Insuring Requirements

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- Determine proposed insured's requirements
- ALTA 9-06 coverage
  - Requires review of survey
  - Requires review of declarations for rights of first refusal, rights of first offer, approvals, etc.

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Divorces

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- Termination of the estate by the entirety
- Potential attachment of judgment
- Homestead status
- Review of divorce proceedings and marital settlement agreement
- Conveyance by former spouse

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Construction Lien Risk

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- Priority issues
- Open Notices of Commencement
- Notices of Termination
- Restoration of priority

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Water Rights

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- Sovereignty lands
- Riparian and littoral rights
- Navigational servitudes

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Creditors' Rights

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- Fraudulent conveyance under bankruptcy rules
  - Transfer made with the intent to defraud creditors within one year before filing bankruptcy
  - Debtor received less than "reasonably equivalent value" and was not able to pay debts at time of transfer or as a result of transfer

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Probate, Trusts, Guardianships

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MAY 5-7 2016

Probate

- Estates by the entirety, joint tenants with rights of survivorship
- Homestead property
- Non-homestead property
  - Will must contain power to sell
  - Order authorizing sale

Probate, Trusts, Guardianships

FUND ASSEMBLY
MAY 5-7 2016

Probate

- Use of the summary administration
- Nonresident decedents
  - Testate – Will controls
  - Intestate
    - Within two years – ancillary administration
    - After two years – domiciliary estate documents, summary administration, or separate action to determine heirs

Probate, Trusts, Guardianships

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MAY 5-7 2016

Trusts

- Sec. 689.073, F.S. land trust language
- Homestead issues
- Review of trust documents
- Merger of legal and beneficial interests
  - Signature “as trustee” and individually

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Probate, Trusts, Guardianships

FUND ASSEMBLY
MAY 5-7 2016

Guardianships

- Review of guardianship proceeding required, power to sell must be included in order appointing guardianship or letters of guardianship
- Appointment of guardians for minors
- Minors’ natural guardian

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Business Entities

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MAY 5-7 2016

Corporation

- Certificate of good standing
- Corporate resolution authorizing individual to sign (unless president, vice-president, CEO)
- Alien corporation
  - Certified corporate charter or articles of incorporation
  - Certificate of incumbency
  - Corporate resolution

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Business Entities

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MAY 5-7 2016

Limited Liability Companies

- Certificate of good standing
- Statement of authority
- Signatory is manager of manager-managed or member of member-managed entity
- Bankruptcy requirements
- Dissociation requirements
- Foreign and alien LLCs: Determine individual signing is authorized under laws of place of incorporation

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Easements and Survey Matters

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MAY 5-7 2016

Insuring Easements

- Search must be conducted of easement
- Easement should generally be treated as part of the property for purposes of preparing commitment
- Easement included in deed and policy with "together with"

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Easements and Survey Matters

FUND ASSEMBLY
MAY 5-7 2016

Survey Matters

- Use specific survey exception
- Review for encroachments
  - Neighboring land
  - Easements
  - Setbacks

The Fund ALWAYS DRIVEN

REPRESENTATION AGREEMENT FOR PURCHASER OF RESIDENTIAL REAL ESTATE

RE: _____("Buyer") purchase of _____
("Property") from _____ ("Seller")

Thank you for retaining _____ (the "Firm") to represent you in the above referenced residential real estate transaction. Our representation includes the following:

1. Review of the [*already executed or unexecuted*] Contract in an effort to define and protect your rights as the Buyer of the Property as well as your escrow deposit..
2. Preparation [*or examination*] of the title insurance commitment and review of the code enforcement and permit search as well as the survey (if applicable) so as to issue the required title objections to enable you to receive marketable title at closing. After closing, the Firm will [*issue or review*] the owner's title insurance and mortgagee title insurance policy, if applicable, to confirm that the status of title is in accordance with the contract terms.
3. Preparation [*or examination*] of the proposed closing documents, including the Deed, Bill of Sale, Seller's Affidavits and Settlement Statement or Closing Disclosure to confirm compliance with the contract terms.
4. Coordination of the settlement with your mortgage lender (if applicable) and review and explanation of the mortgage loan documents to confirm the lender's compliance with the required loan disclosures provided to you at the inception of the transaction.
5. Specific legal guidance that you may request of a competent residential real estate attorney to guide you through the process of closing on the purchase of the Property.

Our representation does not include the following:

1. Review and counseling regarding any condominium or homeowner's association documents and the related rules and regulations.
2. Federal tax laws and tax implications of ownership and transfer of the Property.
3. Estate planning, asset protection and marital law.
4. Any mediation, litigation or other legal or enforcement actions arising from any actual or alleged default situation.

The Firm's fee for this representation is $_____, which you agree to pay at the earlier of the closing of the transaction or the termination of the Contract. You also agree to reimburse the Firm for any third party charges incurred on your behalf, such as for the survey, municipal lien and permit searches, title searches and estoppels fees. Our firm, as agent for the title insurance underwriter, will also collect from you at closing the premium for the owner's title insurance policy as well as any required lender's title insurance policy and endorsements. The title insurance premiums will be charged at the rate promulgated by the Florida Office of Insurance Regulation. Notwithstanding confidentiality rules imposed by the Florida Bar, you consent to the audit of the Firm's trust account by the title insurance underwriter.

Please sign below signifying your consent to this representation and consenting to the Firm communicating with you through electronic means (e.g., email). We look forward to representing you in this transaction.

_____ _____

DRAFT ENGAGEMENT LETTER

RE: _____("Buyer") purchase of
_____("Property") from _____("Seller")

Dear:

We appreciate your asking _____[insert firm name], (the "Firm") to represent you with the above referenced matter. Please accept this letter as an engagement letter between you and our Firm, ("Engagement Letter" or "Engagement"). This Engagement Letter will include the terms and conditions set forth herein as well as the terms and conditions set forth in the attachment, ("Terms of Engagement").

This Engagement shall consist of *[enter brief description of the "general" reason for the Engagement. For example:* the Firm representing you in the purchase of the above mentioned Property from the Seller pursuant to the [*already executed or unexecuted*] Contract for Purchase and Sale, ("Contract").

SCOPE OF REPRESENTATION AND EXCLUDED SERVICES

The following information will outline the services which are included within this Engagement as well as services which are excluded:

SERVICES INCLUDED:

1. Review of the [*already executed or unexecuted*] Contract in an effort to define and protect your rights as the Buyer of the Property as well as your escrow deposit, ("Escrow Proceeds");

2. We will [*prepare or examine*] the title insurance commitment, code enforcement lien search and permit search as well as the survey (if applicable) and make all necessary title objections in order to ensure that you receive marketable title at closing. After closing we will [*issue or review*] the owner's title insurance and mortgagee title insurance policy, if applicable.

3. We will *[prepare or examine*] the proposed closing documents, including the Deed, Bill of Sale, Seller's Affidavits and HUD-1 Settlement Statement to ensure they are in order for your closing.

4. We will [*coordinate or ensure proper coordination of*] the settlement with your mortgage lender (if applicable) and ensure the mortgage documents are in accord with the lender's loan commitment and good faith estimate ("GFE") provided to you at the inception of the transaction.

5. We will [*serve as or monitor*] the disbursement of your Escrow Proceeds as well as [*disburse or ensure correct disbursement*] of the closing proceeds to the Seller as well as to third party payees pursuant to the HUD-1 Settlement Statement.

SERVICES NOT INCLUDED:

Please note that the following services are not included in this Engagement. Should you desire additional legal counsel and representation for the following matters (or any other matter not specifically outlined above, we must discuss and confirm these terms in writing under a separate engagement.

1. Review and counseling regarding the Condominium documents and rules and regulations;

2. United States Tax laws and tax implications of ownership and transfer of the Property;

3. Review and advice regarding property taxes and homestead compliance;

4. Estate planning, asset protection and marital law;

5. Should the Seller fail to close or default under the Contract, the legal services required to enforce the Contract are separate and apart from the transactional representation contained herein;

FEE FOR SERVICES:

Our fee for this Engagement will be $_____, which we require be paid in advance, ("Retainer Fee"). Our wire instructions are attached for your convenience; or you may send us a check. Please note, we will not be officially Engaged until such time as the Retainer Fee has cleared our account.

In addition to the Retainer Fee, we will charge a title insurance premium at closing in the amount of the statutory rate of title insurance based on the purchase price set forth in your Contract as well as any charges for mortgagee title policy and endorsements.

REPRESENTATION AFTER CLOSING:

Although it is our policy to continue representation of you until such time as all necessary documents are recorded in the public records and the title insurance policy has been issued in accordance with the title commitment, (the "Completion of Representation") our Retainer Fee does not include additional work which may be required on your behalf after this timeframe. Any representation after the Completion of Representation will require an additional engagement letter and retainer fee.

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FUND ASSEMBLY 2016

ADVISING REAL ESTATE LICENSEES ON AVOIDING MALPRACTICE CLAIMS AND LICENSURE COMPLAINTS

BREAKOUT TOPIC

Jamie B. Mose, President of the Orange County Bar Association

Back to Speaker Topics

SPEAKER INFORMATION

ADVISING REAL ESTATE LICENSEES ON AVOIDING MALPRACTICE CLAIMS AND LICENSURE COMPLAINTS

Jamie B. Moses
President of the Orange County Bar Association

Jamie B. Moses has dedicated her practice for the past 21 years to the defense of professionals, including lawyers, real estate agents, appraisers, and title agents in litigation and before licensing authorities. She is also a Board Certified Appellate Specialist. Ms. Moses is rated AV-Preeminent by Martindale-Hubbell and has been recognized as one of Florida's Legal Elite and Orlando's Top Lawyers. She practices in both state and federal trial courts as well as state and federal appellate courts.

Ms. Moses is very active in The Florida Bar having served as President of the Young Lawyers Division of The Florida Bar, on the Board of Governors of The Florida Bar, Chair of the Appellate Court Rules Committee, and is currently the Chair of the Statewide Advertising Grievance Committee. She was recently appointed by The Florida Bar to the At-Large seat on the Florida Realtor-Attorney Joint Committee.

Ms. Moses is currently the President of the Orange County Bar Association and is a past President of the Orange County Bar Legal Aid Society. In June of 2015, she received The Florida Bar Appellate Practice Section's Pro Bono Award. Ms. Moses is a proud graduate of the University of California at Los Angeles and the University of Notre Dame Law School.

Advising Real Estate Licensees on Avoiding Malpractice Claims and Licensure Complaints

Jamie Billotte Moses, Esq.
Fisher Rushmer, P.A.

Insurance Selection Issues:

- Should you have insurance?
- Coverages / Exclusions
  - What one hand gives, the other takes away
  - Claims made v. occurrence
  - Name insureds / additional insureds
- Deductible
  - Indemnity
  - Fees and Idemnity
- Consent
  - Hammer Clauses
  - Risks related thereto
- Premiums
  - How they are calculated before a claim v. after a claim
- Effect of claims on policy
- Tail coverage
  - Should you get it?

When You Get A Claim:

- Report It
  - How?
  - Why?
- Talk to no one
  - What does that mean?
  - Why?
- Gather materials and personnel
- Litigation
  - What to expect?

Best Practices:

- File Retention
  - CYA v. Easy Deniability
  - Title Companies
- Avoiding Conflicts
  - Families
  - Divorces
  - Prior Listings
- Avoiding Self Interest
  - Usually not covered
  - Presumption against you
- Transaction Brokerage
  - Risks
- Property's History
- Policies and Procedures
  - Manuals – risks
  - Standard procedures
  - Using other offices' forms

CNA

Real Estate Professionals
Errors and Omissions Policy

Declarations

Agency	Branch	Prefix	Policy Number
078990	969	RFB	

Insurance is provided by
Continental Casualty Company
333 S Wabash Ave Chicago, IL 60604,
A Stock Insurance Company.

1. **NAMED INSURED AND MAILING ADDRESS:**

NOTICE TO POLICYHOLDERS:
The Errors and Omissions Liability coverage afforded by this policy is on a Claims Made basis. Please review the policy carefully and discuss this coverage with your insurance agent or broker.

2. **POLICY PERIOD:** Inception: 04/10/2015 Expiration: 04/10/2016
at 12:01 A.M. Standard Time at the address shown above.

3. **ERRORS AND OMISSIONS LIABILITY:**

A. Limits of Liability:	Each Claim:	$1,000,000	Aggregate:	$1,000,000
B. Discrimination Limits of Liability:				$500,000
C. Deductible:	Each Claim:			$5,000
D. First Coverage Date:	04/10/1998			
E. Prior Acts Date:	04/10/1998			

4. **PREMIUM:** $2,603.00

DISCRIMINATION (Optional $500,000 Sublimit): $100.00
TOTAL PREMIUM: $2,703.00

Kathleen M. Avery

Countersigned by Authorized Representative

CNA65780XX ED. 05-2012

I96630-B19755

5. **FORMS AND ENDORSEMENTS ATTACHED AT INCEPTION:**

CNA65781XX	Errors and Omissions Policy
CNA68180FL	Cancellation/Non-Renewal - Florida
CNA68080FL	Amendatory Endorsement -Florida

6. **WHO TO CONTACT FOR MATERIAL CHANGES AND TO REPORT A CLAIM:**

Victor O. Schinnerer and Company
Two Wisconsin Circle
Chevy Chase, Maryland 20815

Countersigned by Authorized Representative

CNA

Real Estate Professionals
Errors and Omissions Policy

INSURED:
Policy: Effective: 04/10/2015 Endorsement Number: 1

CANCELLATION / NON-RENEWAL ENDORSEMENT – FLORIDA

Wherever used in this endorsement: 1) Insurer means "we", "us", "our" or the "Company" as those terms may be defined in the policy; and 2) Named Insured means the first person or entity named on the declarations page; and 3) "Insured(s)" means all persons or entities afforded coverage under the policy.

Any cancellation, non-renewal or termination provision(s) in the policy are deleted in their entirety and replaced with the following:

CANCELLATION AND NON-RENEWAL

A. CANCELLATION

1. The Named Insured may cancel the policy at any time. To do so, the Named Insured must return the policy to the Insurer or any of its authorized representatives, indicating the effective date of cancellation; or provide a written notice to the Insurer, stating when the cancellation is to be effective.

2. If the policy has been in effect for ninety (90) days or less the Insurer may cancel the policy by mailing or delivering written notice to the Named Insured, at the last mailing address known to the Insurer, at least:

   a. Ten (10) days prior to the effective date of cancellation, if the Insurer cancels for nonpayment of premium;
   b. Sixty (60) days prior to the effective date of cancellation, if the Insurer cancels for any other reason, except the Insurer may cancel immediately for:
      i. A material misstatement or misrepresentation; or
      ii. A failure to comply with underwriting requirements established by the Insurer.

3. If the policy has been in effect for more than ninety (90) days the Insurer may not cancel the policy unless such cancellation is based on one or more of the following reasons:

   a. Nonpayment of premium;
   b. A material misstatement;
   c. A failure to comply with underwriting requirements established by the Insurer within ninety (90) days of the date of effectuation of coverage;
   d. A substantial change in the risk covered by the policy; or
   e. When the cancellation is for all insureds under such policies for a given class of insureds.

   Written notice of cancellation will be mailed or delivered to the Named Insured, at the last mailing address known to the Insurer, at least:

   i. Ten (10) days prior to the effective date of cancellation, if the Insurer cancels for nonpayment of premium;

INSURED: ıc.
Policy: Effective: 04/10/2015 Endorsement Number: 1

ii. Sixty (60) days prior to the effective date of cancellation, if the Insurer cancels for the reasons stated in A.3.b., A.3.c., A.3.d., or A.3.e. above.

4. The notice will state the actual reason for the cancellation.

5. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

6. If notice is mailed, proof of mailing will be sufficient proof of notice.

7. The unearned premium shall be computed on a pro-rata basis. The unearned premium is to be mailed within fifteen (15) working days after the effective date of the cancellation. The cancellation will be effective even if the Insurer has not made or offered a refund.

B. NON-RENEWAL

1. The Insurer can non-renew the policy by giving written notice to the Named Insured, at the last mailing address known to the Insurer, at least sixty (60) days before the expiration date.

2. The notice of non-renewal will state the actual reason for non-renewal.

3. If notice is mailed, proof of mailing will be sufficient proof of notice.

C. CONDITIONAL RENEWAL

1. The Insurer will mail or deliver written notice of the renewal premium to the Named Insured, at the last mailing address known to the Insurer, at least sixty (60) days in advance.

2. If notice is mailed, proof of mailing will be sufficient proof of notice.

All other terms and conditions of the Policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the Policy issued by the designated Insurers, takes effect on the effective date of said Policy at the hour stated in said Policy, unless another effective date is shown above, and expires concurrently with said Policy.

Kathleen M. Avery

Countersigned by Authorized Representative

CNA

Real Estate Professionals
Errors and Omissions Policy

INSURED:
Policy:

Effective: 04/10/2015

Endorsement Number: 2

AMENDATORY ENDORSEMENT FLORIDA

It is agreed that the following special condition is added to the Policy:

Notice: The following telephone number is provided in the event any questions arise regarding this Policy:

1-877-732-5444.

All other provisions of this policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the Policy issued by the designated Insurers, takes effect on the effective date of said Policy at the hour stated in said Policy, unless another effective date is shown above, and expires concurrently with said Policy.

Kathleen M. Avery

Countersigned by Authorized Representative

CNA68080FL (10-12)

I96630-B19755

REAL ESTATE PROFESSIONALS ERRORS AND OMISSIONS POLICY

THIS INSURANCE IS WRITTEN ON A CLAIMS-MADE BASIS AND ONLY APPLIES TO THOSE CLAIMS FIRST MADE AGAINST INSUREDS WHILE THIS POLICY IS IN FORCE. NO COVERAGE EXISTS FOR CLAIMS FIRST MADE AGAINST INSUREDS BEFORE THE BEGINNING OR AFTER THE END OF THE POLICY PERIOD UNLESS, AND TO THE EXTENT, AN EXTENDED REPORTING PERIOD APPLIES. PLEASE REVIEW THE POLICY CAREFULLY AND DISCUSS THIS COVERAGE WITH YOUR INSURANCE AGENT OR BROKER.

Throughout this Policy, the terms "we", "us" and "our" refer to the Insurance Company listed on the Declarations as providing this Insurance. Other words and phrases that appear in bold have the meaning set forth in Section V. DEFINITIONS. Refer to Section V. DEFINITIONS.

I. INSURING AGREEMENT

A. Indemnity

We will pay all amounts in excess of the deductible and within the limits of liability applicable to this Policy, that the **Insured** becomes legally obligated to pay as **damages** as a result of a **claim** by reason of an act or omission in the rendering of **professional real estate services** by the **Insured**, or by any person for whom the **Insured** is legally liable, provided that:

1. such act or omission in the rendering of **professional real estate services** took place on or after the Prior Acts Date set forth on the Declarations; and
2. on the First Coverage Date shown on the Declarations, no **Insured** knew or could reasonably have expected that such act or omission, or **related acts or omissions**, would result in a **claim**.

A **claim** must be first made during the **policy period** and must be promptly reported to us in accordance with Section VII. CONDITIONS, Paragraph B. Notice of **claims** and potential **claims**.

B. Defense

We shall have the right and duty to defend a **claim** even if any of the allegations of the **claim** are groundless, false or fraudulent. We shall have the right to appoint counsel and to make such investigation, settlement and defense of a **claim** as is deemed necessary by us. If a **claim** is submitted to arbitration or mediation, we shall be entitled to exercise all of the **Insured's** rights in the choice of arbitrators or mediators and in the conduct of an arbitration or mediation proceeding.

We shall not settle a **claim** without the **Insured's** consent. If the **Insured** refuses to consent to a settlement or compromise recommended by us and acceptable to the claimant, then our limit of liability shall be reduced to the amount for which the **claim** could have been settled plus **claim expenses** incurred up to the time we made our recommendation, which amount shall not exceed the remainder of the limit of liability specified in Section III. LIMITS OF LIABILITY/DEDUCTIBLE, Paragraph B. Limit of Liablity – each **claim**.

We are not obligated to investigate, defend, pay or settle, or continue to investigate, defend, pay or settle a **claim** after the applicable limit of our liability has been exhausted by payment of **damages**. In such case, we shall have the right to withdraw from the further investigation, defense, or settlement of such **claim**.

II. SUPPLEMENTARY PAYMENTS

Payments made under this section are not subject to the deductible and are in addition to the limit of liability shown on the Declarations.

A. Loss of Earnings

We will pay up to $500 for loss of earnings to each **Insured** for each day or part of a day such **Insured** is in attendance, at our request, at a trial, hearing or arbitration proceeding involving a **claim** against such **Insured**. In no event shall the amount payable hereunder exceed $15,000 per **policy period** regardless of the number of **Insureds** or **claims.**

B. Licensing Proceedings

We will pay up to $15,000 to the **Insured** for attorney fees and other reasonable costs, expenses or fees resulting from the investigation or defense of a proceeding before a real estate licensing board incurred by the **Insured** as the result of a notice of proceeding both first received by the **Insured** and reported to us during the **policy period**, arising out of an act or omission in the rendering of **professional real estate services** by the **Insured**. In no event shall the amount payable hereunder exceed $15,000 per proceeding and $30,000 per **policy period** regardless of the number of **Insureds** or the number of such proceedings.

C. Subpoena Assistance

If during the **policy period**, the **Insured** receives a subpoena for documents or testimony arising out **of professional real estate services** and the **Insured** requests, in writing, our assistance in responding to the subpoena and provides to us a copy of the subpoena during the **policy period**, then we will retain an attorney to provide advice regarding the production of documents, to prepare the **Insured** for sworn testimony and to represent the **Insured** at the **Insured's** depositions, provided that:

1. the subpoena arises out of a lawsuit to which the **Insured** is not a party; and
2. the **Insured** has not been engaged to provide advice or testimony in connection with the lawsuit, nor has the **Insured** provided such advice or testimony in the past.

D. **Public Relations**

We will reimburse **you** up to $15,000 per **public relations event**, subject to a maximum of $50,000 per **policy period**, for reasonable **public relations expenses** incurred by **you** for advisory services provided by a public relations firm to **you** as a result of a **public relations event** which occurs during the **policy period**.

E. Pre-**claims** Assistance

Until the date a **claim** is made, we may pay for all costs or expenses we incur, at our sole discretion, as a result of investigating a potential **claim** that the **Insured** reports in accordance with Section VII. CONDITIONS, Paragraph B. Notice of **claims** and potential **claims**, subparagraph 2.

F. Privacy Response

We will pay up to $20,000 for expenses incurred by the **Insured** during the **policy period** to:

1. hire a computer forensics firm to investigate the existence and cause of any computer or **network security breach** and to determine the extent of any unauthorized release or use of **confidential commercial information** or **non-public personal information**; and
2. provide notification to individuals or entities whose **confidential commercial information** or **non-public personal information** may have been disclosed or used in an unauthorized manner;

provided that:

a. the **Insured first** discovers such breach, unauthorized use or disclosure during such **policy period**;
b. the **confidential commercial information or non-public personal information** was gathered in the course of rendering **professional real estate services**; and
c. such notification is required to effect compliance with a **security breach notice law**.

III. LIMITS OF LIABILITY/DEDUCTIBLE

A. **Claim expenses** in addition to limits of liability

We shall pay **claim expenses** in connection with covered **claims. Claim expenses** are in addition to the limit of liability.

B. Limit of liability - each **claim**

Subject to paragraph C. below, our limit of liability for **damages** for each **claim** shall not exceed the amount stated in the Declarations for "each **claim**".

C. Limit of liability - in the aggregate

Our limit of liability for **damages** for all **claims** shall not exceed the amount stated in the Declarations as the "aggregate".

D. Discrimination Limit of Liability – **damages** and **claim expenses**

The Discrimination **Limit** of Liability, as set forth in the Declarations, is applicable to **damages** and **claim expenses** with respect to each **discrimination claim** and to all **discrimination claims**. The Discrimination Limit of Liability is a sublimit included within and not in addition to the limits of liability shown on the Declarations. Such sublimit is subject to the deductible.

E. Deductible

The deductible amount stated in the Declarations is the total amount of the **Insured's** obligation for each **claim** (other than a **lockbox claim**) and applies to the payment of **damages** and **claim expenses**. The deductible shall be paid by **you**, or upon **your** failure to pay, jointly and severally by all **Insureds**. The deductible applies separately to each **claim**. The limits of liability set forth in the Declarations are in addition to, and in excess of, the deductible.

F. Multiple **Insureds**, **claims** and claimants

The limit of liability shown in the Declarations is the maximum amount we will pay as **damages** regardless of the number of **Insureds**, **claims** made or persons or entities making **claims**.

G. **Related Claims**

If **related claims** are subsequently made against the **Insured** and reported to us during this **policy period** or any renewal policy period then all such **related claims** shall be considered a single **claim** first made within the **policy period** in which the earliest of the **related claims** was first made.

IV. RISK MITIGATION INCENTIVE

A. Consent Credit

If the **Insured** promptly consents to settle a **claim** when we first ask for their consent then, upon **your** written request, the deductible for which the **Insured** is then liable will be reduced by 25% up to a maximum of $250 per **claim**. **Your** written request must be received within 90 days of such settlement.

B. Deductible Waiver

The **Insured's** obligation to pay the deductible amount stated in the Declarations shall be waived, for an amount not to exceed $5,000, if the following conditions are met and evidence of such is provided to us when notice of a **claim** is received:

1. a seller disclosure form was signed by the seller and acknowledged by the buyer prior to closing;
2. a home warranty policy was purchased prior to closing;
3. either
   a. a home inspection was completed and a copy was provided to the buyer prior to closing; or
   b. if **you** act solely as the buyer's agent a statement outlining the reasons a home inspection should be completed and a list of at least three home inspection companies was provided to such buyer prior to the closing; and
4. a state or local board approved standard sales contract was utilized.

The obligation to pay the deductible will not be waived if any **Insured** individually acted as both the buyer's and seller's agent in the transaction which gives rise to the **claim**.

C. Mediation Incentive

If mediation of a **claim** takes place either without institution of arbitration proceedings or service of suit or within 180 days of the institution of such proceedings or service of suit, and such **claim** is ultimately resolved by the process of mediation, the deductible applying to the **claim** will be reduced by 50% or $25000, whichever is less.

In the event that one **claim** is eligible for more than one Risk Mitigation Incentive then **you** shall receive the benefit of the highest deductible credit. In no way shall this section be construed to afford more than one Risk Mitigation Incentive per **claim**.

V. DEFINITIONS

Bodily injury means bodily injury, sickness or disease and death and includes mental injury, mental anguish, mental tension, emotional distress, pain, suffering or shock sustained by any person, whether or not resulting from injury to the body.

Circumstance means an act or omission from which an **Insured** reasonably expects that a **claim** could be made.

Claim means a demand, including the service of suit or the institution of an arbitration proceeding received by the **Insured** for money or service, including a demand alleging **personal injury**, arising out of an act or omission in the rendering of **professional real estate services**. Except as respects an **innocent insured**, a **claim**, other than a **claim** for **personal injury**, cannot arise from intentionally wrongful, dishonest, fraudulent, malicious, or criminal conduct committed by an **Insured** or at an **Insured's** direction or with the **Insured's** prior knowledge. Criminal proceedings are not covered under this Policy regardless of the allegations made against any **Insured**;

Claim also means **privacy claims** and **client network damage claims**.

Claim expenses means:

A. fees charged by attorneys designated by us; and
B. all other reasonable and necessary fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a **claim** if incurred by us, or by the **Insured** with our written consent.

Claim expenses do not include fees, costs or expenses of independent adjusters or salaries of our officials or employees, other than fees, costs and expenses charged by our employed attorneys who may be designated to represent the **Insured**.

Client Network Damage Claim means a demand, including the service of suit or the institution of an arbitration proceeding, received by the **Insured** for money or services alleging that a **security breach** or **electronic infection** caused **network damage** to a client's **network** in the rendering of **professional real estate services**.

Computer Virus means unauthorized computer code that is designed and intended to transmit, infect and propagate itself over one or more **networks**, and cause:

A. a computer code or programs to perform in an unintended manner;
B. the deletion or corruption of electronic data or software; or
C. the disruption or suspension of a **network**.

Confidential Commercial Information means information that has been provided to the **Insured** by another, or created by the **Insured** for another where such information is subject to the terms of a written confidentiality agreement or equivalent obligating the **Insured** to protect such information on behalf of another.

Construction manager means a person providing the following services in connection with the construction, reconstruction and renovation of real property:

A. management of facility construction, reconstruction and renovation plans;
B. development and management of construction, reconstruction and renovation contracts and subcontracts; or
C. development of loss control and risk management plans in connection with the construction, reconstruction or renovation.

Damages mean judgments, awards and settlements, provided any settlement is made with our prior written consent. **Damages** do not include:

A. the return or restitution of fees, commissions, expenses or costs;
B. civil or criminal fines, sanctions, penalties or forfeitures, whether pursuant to law, statute, regulation or court rule;
C. punitive or exemplary amounts;
D. the multiplied portion of multiplied awards;
E. injunctive or declaratory relief;
F. any amount that is not insurable under any applicable law; or
G. plaintiff's attorneys fees associated with any of the above.

Denial of Service Attack means an attack executed over one or more **networks** or the **internet** that is specifically designed and intended to disrupt the operation of a **network** and render a **network** inaccessible to authorized users.

Discrimination Claim means a **claim** based on or arising out of discrimination, humiliation, harassment, or misconduct that includes but shall not be limited to a **claim** based on an individual's race, creed, color, age, gender, national origin, religion, disability, marital status or sexual preference.

Domestic Partner means any person qualifying as a "domestic partner" under any federal, state or local laws or under **your** employee benefit plans.

Electronic Infection means the transmission of a **computer virus** to a **network**, including without limitation, such transmission to or from **your network**.

Electronic Information Damage means the destruction, deletion or alteration of any information residing on the **network** of any third party.

Guaranteed Sale Listing Contract means a written agreement between **you** and the seller of a property, in which **you** agree to purchase the property if it is not sold under the listing agreement in the time frame specified by the agreement.

Innocent Insured means an **Insured** who, upon request, affirmatively states under oath to us that they did not commit or have prior knowledge of the intentionally wrongful, dishonest, fraudulent, malicious or criminal acts or omissions alleged in a **claim**. A person who fails to take affirmative steps to mitigate loss upon learning of an intentionally wrongful, dishonest, fraudulent, malicious or criminal act or omission, or who is found by a court of competent jurisdiction to have committed such acts or omission, is not an **innocent insured**.

Insured means **you** and any of the persons or entities listed below but only while rendering **professional real estate services** on **your** behalf for others:

A. any person who is or becomes **your** partner, officer, director, employee, member, or independent contractor during the **policy period**;
B. any person previously affiliated with **you** as **your** partner, officer, director, employee, member or independent contractor;
C. any personal assistant of an **Insured** as set forth in A or B., above, but only while rendering **professional real estate services** on behalf of such individual **Insured**;
D. any **subsidiary** and **newly acquired subsidiary**.

Insured also means any real estate corporation of which **you** are a franchisee, but only as respects such real estate corporation's liability for acts or omissions of an **Insured** in the rendering of **professional real estate services**.

Internet means the worldwide public **network** of computers as it currently exists or may be manifested in the future, but **Internet** does not include the **named Insured's network**.

Lock Box means a keyless entry system or similar device used to gain access when showing properties.

Lock Box Claim means a **claim** alleging **property damage** or **bodily injury**, arising out of the **Insured's** maintenance, operation, or use of a **lock box** in providing **professional real estate services** on property not owned, occupied by, or leased to the **Insured**.

Mortgage broker means a person or entity that originates commercial or residential real estate mortgage loans in the primary or secondary market.

Network means a party's local or wide area network owned or operated by or on behalf of or for the benefit of that party; provided, however, **network** shall not include the **Internet**, telephone company networks, or other public infrastructure network.

Network Damage means:
A. the unscheduled and unplanned inability of an authorized user to gain access to a **network**;
B. **electronic information damage**; or
C. the suspension or interruption of any **network**.

Newly Acquired Subsidiary means any entity of which **you** acquire, through acquisition, merger or formation, during the **policy period**, more than a 50% interest in such entity, but only upon the conditions that:
A. within 60 days of such acquisition, we shall have been provided with full particulars of such **newly acquired subsidiary**;
B. we, after receipt of such notice have agreed in writing to insure such **newly acquired subsidiary**; and,
C. **you** have paid any additional premium and have agreed to any amendment of the provisions of this Policy.

On the date during **the policy period** that **your** direct or indirect ownership interest in such corporation becomes less than 50% of the issued and outstanding voting stock, such corporation shall cease to be a **newly acquired subsidiary** under the terms of this Policy.

Non-Public Personal Information means personal information not available to the general public from which an individual may be identified, including without limitation, an individual's name, address, telephone number, social security number, account relationships, account numbers, account balances, and account histories.

Open House means an advertised designated time period where multiple potential buyers have the opportunity to view the specific property that is listed for sale by the **Insured** while in the care, custody or control of the **Insured**.

Open House Claim means a **claim** alleging that **property damage** occurred as a result of an act or omission during an **open house**.

Personal Injury is an injury, other than **bodily injury**, arising out of one or more of the following offenses:
A. false arrest, detention, or imprisonment;
B. malicious prosecution;
C. wrongful entry into, wrongful eviction from, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
D. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
E. oral or written publication of material that violates a person's right of privacy.

Policy Period means the time from 12:01 A.M. on the inception date of this Policy to the earlier of 12:01 A.M. of the expiration, termination or cancellation date of this Policy.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. Pollutants also means asbestos, radon and lead.

Privacy Claim means a demand, including the service of suit or the institution of an arbitration proceeding, received by the **Insured** for money or services and alleging **privacy injury and identity theft** that occurred in the rendering of **professional real estate services**.

Privacy Injury and Identity Theft means any unauthorized disclosure of, inability to access, or inaccuracy with respect to **non-public personal information** in violation of any federal, state, foreign or other law, statute or regulation governing the confidentiality, integrity or accessibility of **non-public personal information**, including but not limited, to the Health Insurance Portability and Accountability Act of 1996, Gramm-Leach-Bliley Act, Children's Online Privacy Protection Act, or the EU Data Protection Act.

Professional Real Estate Services means those services rendered by an **Insured** for others as a:

A. real estate agent;
B. real estate broker;
C. real estate personal assistant, real estate appraiser, **property manager**, real estate leasing agent, **short term escrow agent**, **mortgage broker** or auctioneer of real property, provided that all necessary licenses or certifications are held by the **Insured** at the time of the act or omission giving rise to the **claim**;
D. expert witness or real estate consultant or counselor provided such services are limited to the areas specified in paragraphs A. through C. of this definition; or
E. notary public; or member of a formal real estate accreditation, standards review or similar real estate board or committee.

Services as a **construction manager** are not **professional real estate services**.

Property Damage means:

A. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
B. loss of use or theft of tangible property that is not physically damaged.

Property manager means a person or entity providing the following services in connection with the management of commercial or residential property:

A. development and implementation of management plans and budget;
B. oversight of physical maintenance of property by others, except if such physical maintenance is performed by an **Insured** or by an entity owned by an **Insured** in whole or in part;
C. solicitation, evaluation and securing of tenants and management of tenant relations, collection of rent and processing evictions;
D. development, implementation and management of loss control and risk management plans for real property;
E. development, implementation and management of contracts and subcontracts (excluding property and liability insurance contracts) necessary to the daily functioning of the property; or
F. personnel administration and record keeping in connection with a managed property;

Property manager does not include a **construction manager**.

Public Relations Event means:

A. departure, incapacitation, illness or death of a partner, member, officer, director, or sole proprietor-owner of **yours**;
B. **your** dissolution for any reason other than bankruptcy;
C. violent act, kidnapping, sexual assault, criminal firearm use, or workplace accident resulting in negative local or national media coverage of **you**.

Public Relations Expenses means reasonable fees and expenses incurred by **you** for advisory services provided by a public relations firm to **you** for up to 60 days following a **public relations event**.

Related claims means all **claims** arising out of a single act or omission or arising out of **related acts or omissions** in the rendering of **professional real estate services.**

Related Acts or Omissions mean all acts or omissions in the rendering of **professional real estate services** that are logically or causally connected by any common fact, **circumstance**, situation, transaction, event, advice or decision.

Residential Property means a one to four family dwelling.

Security Breach means the failure of **your network** hardware, software, firmware, the function or purpose of which is to:

A. identify and authenticate parties prior to accessing the **your network**;
B. control access to **your network** and monitor and audit such access;
C. protect against **computer viruses**;
D. defend against **denial of service attacks** upon the **Insured** or unauthorized use of the **Insured's network** to perpetrate a **denial of service attack**; or,
E. ensure confidentiality, integrity and authenticity or information on the **Insured's network**.

Security Breach Notice Law means any statute or regulation that requires an entity that maintains **confidential commercial information** or **non-public personal information** to provide notice to specified individuals of any actual or potential unauthorized disclosure or potential disclosure of such information.

Seller's Real Property Disclosure Statement means a written disclosure of the known condition of the **residential property** by the seller, including the existence of past or present environmental hazards.

Subsidiary means any entity in which **you** own, either directly or indirectly, more than a 50% interest, and such entity is listed on the application for this Policy. On the date during the **policy period** when **your** ownership interest in such entity becomes less than 50% of the issued and outstanding voting stock, such corporation shall cease to be a **subsidiary** under the terms of this Policy. In such event, coverage under this Policy will continue, but only with respect to acts or omissions committed prior to such date and in accordance with all other terms and conditions of this Policy.

Short Term Escrow Agent means an **Insured** who, in connection with the sale or purchase of real estate, receives or holds funds in, or distributes funds from, an escrow or trust account where all such funds are to be fully distributed within twelve months from the date received.

Totally and Permanently Disabled means that an **Insured** is so disabled as to be wholly prevented from rendering **professional real estate services** provided that such disability:

A. has existed continuously for not less than six (6) months; and
B. is reasonably expected to be continuous and permanent.

Unauthorized Access means any accessing of information in the **Insured's** care, custody or control by unauthorized persons or by authorized persons accessing or using such information in an unauthorized manner. **Unauthorized access** also includes:

A. theft from the **Insured** of any information storage device used by the **Insured** to:
    1. store and retrieve information on the **Insured's network**; or
    2. transport information between the **Insured** and authorized recipients;
B. any unauthorized use by the **Insured** of information in the **Insured's** clients' care, custody or control if accessed by the **Insured** in the course of rendering **legal services**.

You, Your and **Yours** refer to the persons and entities designated as Named Insured in the Declarations.

VI. EXCLUSIONS

We will not defend or pay any **claim**:

A. **Bodily Injury**

based on or arising out of any actual or alleged **bodily injury**, except that this exclusion shall not apply to a **lock box claim**;

B. **Property Damage**

based on or arising out of any actual or alleged **property damage**, except that this exclusion shall not apply to:
1. a **lock box claim**;
2. an **open house claim**;

C. Conversion

based on or arising out of any actual or alleged failure to pay or collect money held for others or any conversion, commingling, defalcation, misappropriation or improper use of funds or other property;

D. Misappropriation of ideas

based on or arising out of any actual or alleged misappropriation of ideas, information or materials; improper gaining or misuse of confidential or proprietary information, materials or trade secrets; interference with actual or prospective business relationships, contracts or contractual relationships or unfair competition;

E. **Pollutants**, Mold, Fungi or Microbes

based on or arising out of whether suddenly or over a long period of time:
1. any actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, growth or presence of; or
2. any actual, alleged or threatened emission, discharge, dispersal, seepage, release or escape of; or
3. any actual or alleged failure to detect, report, test for, monitor, clean-up, remove, contain, dispose of, treat, detoxify or neutralize, or in any way respond to, assess the effects of or advise of the existence of;

any **pollutants**, fungi or microbes, or of any spores, mycotoxins, odors, or any other substances, products or byproducts produced by, released by, or arising out of the current or past presence of mold, fungi or microbes;

This exclusion applies regardless of any other cause or event that contributes concurrently or in any sequence to the **damages** claimed. However, this exclusion does not apply to any **claim** against an **Insured**:

a. based on or arising out of the **Insured's** failure, in any way, to advise of the existence of **pollutants**; or

b. based on or arising out of the **Insured's** failure, in his or her capacity as a real estate agent or broker, to advise buyers or sellers of **residential property** of the existence of mold, fungi or microbes at such **residential property**, but if, and only if the following conditions were met:

(i) neither the **Insured** nor the **Insured's** spouse had an ownership interest in such **residential property**;

(ii) a **seller's real property disclosure statement** was completed by the seller and receipt acknowledged by the buyer in writing prior to closing and a copy was retained in the **Insured's** transaction file; and

(iii) if the **Insured** acted as agent for the buyer, a statement or disclosure regarding a buyer's right to request testing or inspection for the existence of mold, fungi or microbes was provided to and acknowledged by the buyer in writing, and a copy was retained in the **Insured's** transaction file.

F. Sale of business

based on or arising out of any actual or alleged sale or purchase or attempted sale or purchase of a business, except that this exclusion does not apply to that portion of a **claim** which relates to the purchase, sale or leasing of real property;

G. Value or business or future value of property

based on or arising out of:
1. any promises, warranties, or guarantees made by an **Insured** as to the future value or future income of any property; or
2. the valuation or performance of a business in conjunction with any property that is sold;

H. **Insured** vs. **Insured**

by or on behalf of any **Insured** against any other **Insured**;

I. Property Syndication or Real Estate Investment Trust

based on or arising out of any actual or alleged formation, syndication, operation or administration of any property syndication, real estate investment trust or any other form of corporation, general or limited partnership or joint venture formed for the purpose of investing in, buying, selling, or maintaining real property;

J. Owned, constructed, developed and purchase of property

based on or arising out of any actual, alleged or attempted: purchase by; sale, leasing, or appraisal of property developed, constructed or owned by:
1. any **Insured**;
2. any entity in which the **Insured** had a financial or a contemplated financial interest;
3. any entity with a financial interest or contemplated financial interest in **you**; or
4. any entity under the same financial control as **you**;

provided that such financial interest, contemplated financial interest, or financial control existed at the time of the act or omission giving rise to the **claim**.

This exclusion does not apply to:
a. the actual or attempted sale of real property that the **Insured** did not construct or develop and in which the combined ownership interest of all **Insureds** at the time of such sale was less than 25%; or
b. the leasing of real property in which the combined ownership interest of all **Insureds** was less than 50% at the time of the **professional real estate services** rendered; or
c. the actual or attempted sale, leasing, or property management of the **Insured's residential property** by another **Insured** who is not the owner of such **residential property**; or
d. the sale of **residential property** by an **Insured** who is the owner of such **residential property** and all of the following conditions are met in connection with such sale:
    (i) a written Home Inspection Report is issued by a licensed or accredited home inspector, or was waived in writing by the buyer prior to closing;
    (ii) a home warranty policy was purchased prior to or at closing;
    (iii) a seller disclosure form was signed by the **Insured** and acknowledged in writing by the buyer prior to closing;
    (iv) the **Insured's** ownership interest in the property was disclosed in writing; and
    (v) a state or local board approved standard sales contract was utilized; or
e. the actual or attempted sale of real property 100% owned by **you** if the property was acquired by **you** under a written **guaranteed sale listing contract**, and from acquisition to resale the title to the property was held by **you** for less than twelve months, and the property was continually offered for sale by **you**;

K. Securities **Claims**

based on or arising out of:
1. the filing of any registration statement under the Securities Acts of 1933, or the Securities Exchange Act of 1934, any State Blue Sky Law, or any other state or local securities law; or
2. the Securities Act of 1933, the Securities and Exchange Act of 1934, rules or regulations of the Securities Exchange Commission under either or both acts, similar securities laws or regulations of state, or any laws of any state relating to any transaction arising out of, involving, or relating to the public offering of securities;

L. Failure to maintain insurance

based on or arising out of any actual or alleged:
1. failure to effect or maintain any insurance, financing or bond;
2. failure to advise of the need for adequate amount or type of insurance, financing or bond;

M. Other interests, operations or activities

based on or arising out of the **Insured's** actual or alleged interests, operations, or activities as an insurance agent, insurance broker, lawyer, mortgage banker, asset manager, investment manager, title agent, title abstractor, **construction manager**, property developer or any other profession for which a license is required;

N. Violation of Law

based on or arising out of any:

1. charges of price fixing, restraint of trade, monopolization or unfair trade; or
2. actual or alleged violation of:
   a. the Federal Trade Commission Act, the Sherman Act, the Clayton Act, or any federal statutory provision regarding anti-trust law, monopoly, price fixing, price discrimination, predatory pricing, or restraint of trade;
   b. Telephone Consumer Protection Act (TCPA) 47 U.S.C. Section 227 Federal Communications Commission (FCC) rules prohibiting facsimile, electronic mail or any other means of communication;
   c. any rules or regulations promulgated under or in connection with the above statutes; or
   d. any similar provision of any state, federal or local statutory law or common law;

O. Contractual Liability

based on or arising out of an **Insured's** alleged liability under any oral or written contract or agreement, unless such liability would have attached to any **Insured** in the absence of such agreement.

VII. CONDITIONS

A. Territory

This Policy applies to acts or omissions that happen anywhere in the world provided that **claim** is made or suit is brought against an **Insured** in the United States of America, its territories or possessions or Puerto Rico or Canada.

B. Notice of **claims** and potential **claims**

1. The **Insured**, as a condition precedent to our obligations, must promptly give written notice to us during the **policy period** or the subsequent renewal policy period of any **claim** made against the **Insured** during such **policy period**. This condition will not be a barrier to coverage for those **Insureds** who do not have personal knowledge of a **claim**. However, all **Insureds** must comply with this condition within 90 days of the expiration of the **policy period**.

2. If during the **policy period**, the **Insured** gives us notice of a **circumstance** detailing:
   a. the specific act or omission;
   b. the dates and persons involved;
   c. the identity of anticipated or possible claimants; and
   d. the circumstances by which the **Insured** first became aware of the possible **claim**,

   then any **claim** that is both made against the **Insured** and reported to us during any renewal policy period and that arises out of such **circumstance** shall be deemed to have been made at the time such written notice was given to us.

C. Assistance and Cooperation

1. The **Insured** shall cooperate with us and upon our request, shall attend hearings, depositions and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and assist in the conduct of suits and proceedings in connection with a **claim**.

2. The **Insureds** shall assist in the enforcement of any right of contribution or indemnity against any person or organization who or which may be liable to any **Insured** in connection with a **claim**.

3. No **Insured** shall voluntarily assume or admit any liability or incur any expense, except at its own cost, without our written consent.

D. Legal Action Limitation

1. The **Insureds** agree not to bring a legal action against us concerning this Policy unless they have fully complied with all the provisions of this Policy; and the **Insured's** obligation to pay shall have been finally determined either by judgment against the **Insured** after actual trial or by written agreement of the **Insured**, the claimant and us.

   Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. No person or organization shall have any right under this Policy to join us as a party to any action against an **Insured**, nor shall we be impleaded by the Insured or his legal representative.

2. If, after the final adjudication or settlement of a **claim**, there is any dispute concerning tort allegations against us regarding the handling or settlement of any **claim**, we and the **Insureds** agree to submit such dispute to any form of alternative dispute resolution acceptable to both parties. Should we and the **Insureds** be unable to agree on the form of alternative dispute resolution, then such dispute shall be submitted to binding arbitration by the American Arbitration Association, under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

E. Changes to **your** business, Acquisitions and Mergers

1. **You** must provide prior notice to us of the following events:
   a. material or significant changes to the type or volume of the **professional real estate services** reported to us in **your** application.
   b. acquisition of **you** by another entity;
   c. **your** merger with another entity;
   d. the acquisition of all or substantially all of **your** assets by another entity; or
   e. the acquisition of all or substantially all of the assets of another entity by **you**.
2. Upon receipt of such notice, we may:
   a. adjust the premium to reflect the added exposure; or
   b. deem this Policy to have ceased with respect to **claims** made against the **Insured** based on any act or omission committed or allegedly committed on or subsequent to the time and date of said event. In such case, the **policy period** shall remain unaltered and coverage will continue but only with respect to acts and omissions committed prior to the time and date of any such events in accordance with all other terms and conditions of this Policy.

F. Other insurance

This Policy shall be specifically excess over any other valid and collectible insurance, self-insurance or indemnification agreement available to the **Insured**, whether such other insurance or indemnification agreement is stated to be primary, contributory, excess, contingent, self-insured retention or otherwise.

G. Subrogation

In the event of any payment, we shall be subrogated to all of the **Insured's** rights of recovery against any person or organization. The **Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The **Insured** shall do nothing to prejudice such rights.

H. Cancellation/Nonrenewal

The Cancellation/Nonrenewal provisions are as set forth in the Cancellation/Nonrenewal Endorsement attached to this Policy.

I. Changes to Policy

Notice to any of our agents or knowledge possessed by any such agent or any other person shall not act as a waiver or change in any part of this Policy. It also will not prevent us from asserting any rights under the provisions of this Policy. None of the provisions of this Policy will be waived, changed or modified except by written endorsement to this Policy.

J. Examination of **Your** Books and Records

We may examine, audit and make copies of **your** books and records at any time during the **policy period** and up to three years afterward.

K. Transfer of Interests

For a transfer of interest or an assignment of this Policy to be effective, the first of **you** named on the Declarations must obtain our written consent.

L. Entire Contract

By acceptance of this Policy the **Insured** agrees that:

1. all of the information and statements provided to us by the Insured are true, accurate and complete and shall be deemed to constitute material representations made by the Insured;
2. this Policy is issued in reliance upon the **Insured's** representations;
3. this Policy, endorsements thereto, together with the completed and signed application and any and all supplementary information and statements provided by the **Insured** to us (all of which are deemed to be incorporated herein) embody all of the agreements existing between the **Insured** and us and shall constitute the entire contract between the **Insured** and us; and
4. the misrepresentation of any material matter by the **Insured** or the **Insured's** agent will render the Policy null and void and relieve us from all liability herein. This Policy is void in any case of fraud by the **Insured** relating to it. It is also void if the **Insured** intentionally conceals or misrepresents a material fact or circumstance concerning this Policy.

M. Sole Agent/Notices

The first of **you** named on the Declarations shall be the sole agent of all **Insureds** for the purposes of effecting or accepting any notices hereunder, any amendments to or cancellation of this policy, for the completing of any applications, for the payment of any premium and the receipt of any return premium that may become due, and the exercising or declining to exercise any right under this policy.

Any notices required to be given by the **Insured** shall be submitted in writing to us or our authorized representative at the address specified in the Declarations. If mailed, the date of mailing of such notice shall be deemed to be the date such notice was given and proof of mailing shall be sufficient proof of notice.

N. Bankruptcy

Bankruptcy or insolvency of the **Insured** or of the **Insured's** estate will not relieve us of our obligations under this Policy. In the event of **your** bankruptcy, insolvency, or dissolution, we shall have, at our sole option, the right to settle any **claim** without obtaining consent.

O. Estates, Legal Representatives and Spouses

The estates, heirs, legal representatives, assigns, spouses and any **domestic partners** of the **Insured** shall also be insured under this Policy; provided, however, coverage is afforded to such estates, heirs, legal representatives, assigns, spouses and **domestic partners** only for **claims** arising solely out of their status as such and, in the case of a spouse or **domestic partner**, where such **claim** seeks **damages** from marital community property, jointly held property or property transferred from the **Insured** to the spouse or **domestic partner**. No coverage is provided for any act, error or omission of an estate, heir, legal representative, assign, spouse or **domestic partner**. All terms and conditions of this Policy, including without limitation the retention, applicable to **damages** and **claim expenses** incurred by the **Insured**, shall also apply to **damages** and **claim expenses** incurred by such estates, heirs, legal representatives, assigns, spouses and **domestic partners**.

P. Trade and Economic Embargoes

This policy does not provide coverage for **Insureds**, transactions or that part of **damages** or **claims expenses** that is uninsurable under the laws or regulations of the United States concerning trade or economic sanctions.

Q. Liberalization

If we adopt any revision that would broaden coverage under this policy form without additional premium at any time during the **policy period**, the broadened coverage will immediately apply to this Policy except that it will not apply to **claims** that were first made against the **Insured** prior to the effective date of such revision.

VIII. EXTENDED REPORTING PERIODS

As used herein, "extended reporting period" means the period of time after the end of the **policy period** for reporting **claims** that are made against the **Insured** during the applicable "extended reporting period" by reason of an act or omission that occurred prior to the end of the **policy period** and is otherwise covered by this Policy.

A. Automatic "extended reporting period"

If this Policy is canceled or non-renewed by either us or by **you**, we will provide an automatic, non-cancelable "extended reporting period" starting at the termination of the **policy period** if **you** have not obtained another policy of real estate agents professional liability insurance within sixty (60) days of the termination of this Policy. This automatic "extended reporting period" will terminate after sixty (60) days.

B. Optional "extended reporting period"

1. If this Policy is canceled or non-renewed by either us or by **you**, then the first of **you** named on the Declarations shall have the right to purchase an optional "extended reporting period". Such right must be exercised by **you** within sixty (60) days of the termination of the **policy period** by providing:
   a. written notice to us; and
   b. with the written notice, the applicable additional premium which will be calculated in accordance with the rates and rules in effect on the inception date of this Policy.
2. The first sixty (60) days of the optional "extended reporting period", if it is purchased, shall run concurrently with the automatic extended reporting period.

C. Death or Disability "extended reporting period"

1. If an **Insured** dies or becomes **totally and permanently disabled** during the **policy period**, then upon the latter of the expiration of: **the policy period**; any renewal or successive renewal of this policy; or any automatic or optional "extended reporting period" such **Insured** shall be provided with a death or disability "extended reporting period" as provided below.
   a. In the event of death, such **Insured's** estate, heirs, executors or administrators must, within sixty (60) days of the expiration of the **policy period**, provide us with written proof of the date of death. This death or disability "extended reporting period" is provided to the estate, heirs, executors and administrators of such **Insured**.
   b. If an **Insured** becomes totally and permanently disabled, such **Insured** or **Insured's** legal guardian must, within sixty (60) days of the expiration of the **policy period**, provide us with written proof that such **Insured** is **totally and permanently disabled**, including the date the disability commenced, certified by the **Insured's** physician. We retain the right to contest the certification made by the **Insured's** physician, and it is a condition precedent to this coverage that the **Insured** agree to submit to medical examinations by any physician designated by us at our expense.
   c. This death or disability "extended reporting period" is provided until such **Insured** shall no longer be **totally or permanently disabled** or until the death of such **Insured**, in which case subparagraph a. hereof shall apply.

2. No additional premium will be charged for any death or disability "extended reporting period".
3. There is no right to exercise the death or disability "extended reporting period" if, prior to the **Insured's** death or disability, the **Insured's** license to perform **professional real estate services** has been revoked, suspended or surrendered at the request of any regulatory authority, or if the **Insured** is the subject of a disciplinary investigation or proceeding during the **policy period**.

D. Non-practicing "extended reporting period"

1. If a designated principal, partner, or owner of the **Named Insured** retires or otherwise voluntarily ceases, permanently and totally, performing **professional real estate services** during the **policy period** and has been continuously insured by us for at least five consecutive **policy periods**, then such **Insured** shall be provided with a non-practicing "extended reporting period" commencing upon the latter of the expiration of: the **policy period**; any renewal or successive renewal of this Policy; or any automatic or optional "extended reporting period".

2. This "extended reporting period" is provided until such **Insured** shall resume performing **professional real estate services** or until the death of such **Insured** in which case subparagraph C. 1. a. hereof shall apply.

3. We will issue a Non-practicing "extended reporting period" only if:
   a. the **Named Insured** requests, in writing from us, an endorsement providing such non-practicing "extended reporting period" no more than sixty (60) days after the date of retirement or sixty (60) days after the end of the **policy period**, whichever is earlier. Such request must include a written confirmation or retirement of such designated principal, partner, or owner of the **Named Insured**; and
   b. the **Named Insured** has paid all premium and deductibles due for this policy at the time the designated principal, partner or owner requests a non-practicing "extended reporting period" endorsement.

4. No additional premium will be charged for any non-practicing "extended reporting period".

5. There shall be no right to the non-practicing "extended reporting period" if the **Insured's** license to practice **professional real estate services** has been revoked, suspended or surrendered at the request of any regulatory authority, or if the **Insured** is the subject of a disciplinary investigation or proceeding during the **policy period**.

E. "Extended reporting periods" limits of liability

Our limit of liability for all **claims** reported during any extended **reporting period** shall be part of and not in addition to the limits of liability for the policy period as set forth in the Declarations and Section III. LIMITS OF LIABILITY/DEDUCTIBLE of this Policy.

F. Elimination of right to any "extended reporting period"

There is no right to any "extended reporting period" if we shall cancel or refuse to renew this Policy due to:
1. non-payment of any premium or deductibles due under this Policy; or
2. non-compliance by the **Insured** with any of the terms and conditions of this Policy; or
3. any misrepresentation or omission in the application for this Policy.

G. "Extended reporting period" not a new Policy

It is understood and agreed that the "extended reporting period" shall not be construed to be a new Policy and any claim submitted during such period shall otherwise be governed by this Policy.

IX. HEADINGS

The descriptions in the headings of this Policy are solely for convenience, and form no part of the terms and conditions of coverage.

IN WITNESS WHEREOF, we have caused this Policy to be executed by our Chairperson and Secretary, but this Policy shall not be binding upon us unless completed by the attachment of the Declarations and executed by our duly authorized representative.

Chairperson

Secretary

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FUND ASSEMBLY 2016

SOVEREIGNTY LANDS (ADVANCED LEVEL)

BREAKOUT TOPIC

Linda Neale Monaco, Fund Legal Education Attorney

Back to Speaker Topics

SPEAKER INFORMATION

HOW TO ADDRESS SOVEREIGNTY LAND ISSUES IN FLORIDA (ADVANCED LEVEL)

Linda Neale Monaco
Fund Legal Education Attorney

Linda N. Monaco is a Legal Education Attorney at The Fund. Ms. Monaco received her B.S. in Industrial Distribution from Texas A&M University and J.D. with honors from Quinnipiac University. She is admitted to practice in Florida, Connecticut and in the United States District Court for Connecticut and is a Florida licensed real estate instructor.

Prior to joining The Fund, Ms. Monaco focused her practice in real estate, family, personal injury and small business. Through her representation of borrowers, Ms. Monaco prepared a continuing education seminar on the practice and pitfall of a residential real estate closing for the New Haven County Bar. She also was an instructor at Branford Hall for the paralegal class in Real Estate.

Since joining The Fund, Ms. Monaco has written several seminars and presented over 100 seminars as well as serving a master of ceremonies for the 15th and 17th Annual Affiliate Assembly in Fort Lauderdale and Miami respectively. Ms. Monaco opened the 50th Annual Fund Assembly by presenting the pre-Assembly event, *Building the Pillars of ALTA's Best Practices – Workshop I*.

FUND ASSEMBLY
MAY 5-7 2016

How To Address Sovereignty Lands Issues In Florida

Overview

- History
- General Sovereignty Lands exception
- Example 1 – locating water
- Example 2 – addressing water issues
- Commitment
- Resources

History
Equal Footing Doctrine

- On March 3, 1845, Florida became a state
  - Lands under navigable water became property of Florida
  - Plus additional set asides
- Lands under navigable water intended to be retained by the state, but could be transferred to private ownership
- United States retained the rights to regulate the use of navigable waters

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History
Swamp & Overflow Lands

- 1850 Swamp and Overflow Lands Act passed
  - This land was unfit for cultivation
- Title to swamp and overflow land in Florida was transferred to the state
- This transfer was 20 million acres
  - Florida consists of 36 million acres
  - Almost 2/3 of entire state
- These lands were intended to be transferred to private ownership

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History
Title from Florida

- By act of the legislature, trustees were appointed to the Internal Improvement Trust Fund (TIIF)
- Land was sold to encourage people to settle in Florida
  - To dredge and fill uninhabitable swamps
  - Proceeds to the Internal Improvement Trust Fund
- Submerged lands must be specifically conveyed
  - *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 342 (Fla. 1986)

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Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d 342 (Fla. 1986)

- State could claim title to land below non-meandered navigable rivers even though there was a deed from TIIF which apparently conveyed the land
- Conveyance of swamp and overflow did not include sovereignty lands
  - Lands under navigable rivers
- Marketable Record Title Act (MRTA) is not applicable to sovereignty lands
- Key is navigable - if navigable then it is sovereignty lands
- TIIF deed must expressly refer to the land as “submerged” otherwise
  - Land below the mean high water line remains with the state
    - Tidally influenced
  - Land below the ordinary high water mark remains with the state
    - Non-tidally influenced

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Coastal Petroleum Effect on Title Insurance

- *Coastal Petroleum* reiterated the necessity of checking for water issues
- Failure to check for water issue has led to full policy claims
- Land that is now dry could still be sovereignty lands
  - Kissimmee River was "straightened out"
  - Old river bed belongs to the state unless specifically deeded as submerged lands
  - Now largest river restoration in the world

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Coastal Petroleum Effect on Title Insurance

- Need to review the status of the land at statehood (March 3, 1845)
- Spoiler islands
  - Created from the dredging of the Intracoastal
  - State owned unless specifically deeded as submerged lands
- United States and Florida still retain right to regulate use of navigable waters

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Title Search

- ALWAYS check
  - Access to public road
  - Water issues
- Pictured right
  - No access to public road
  - Note possible water issues

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General Sovereignty Lands Exception GSL

- "Any adverse ownership claim by the State of Florida by right of sovereignty to any portion of the lands insured hereunder, including submerged, filled and artificially exposed lands and lands accreted to such lands"
- Broadest water exception
  - Preprinted on Owner's commitment
  - Included in unexamined products
  - As a reminder for to check for water issues
- Try to eliminate GSL or
- Only include exceptions specific to subject property

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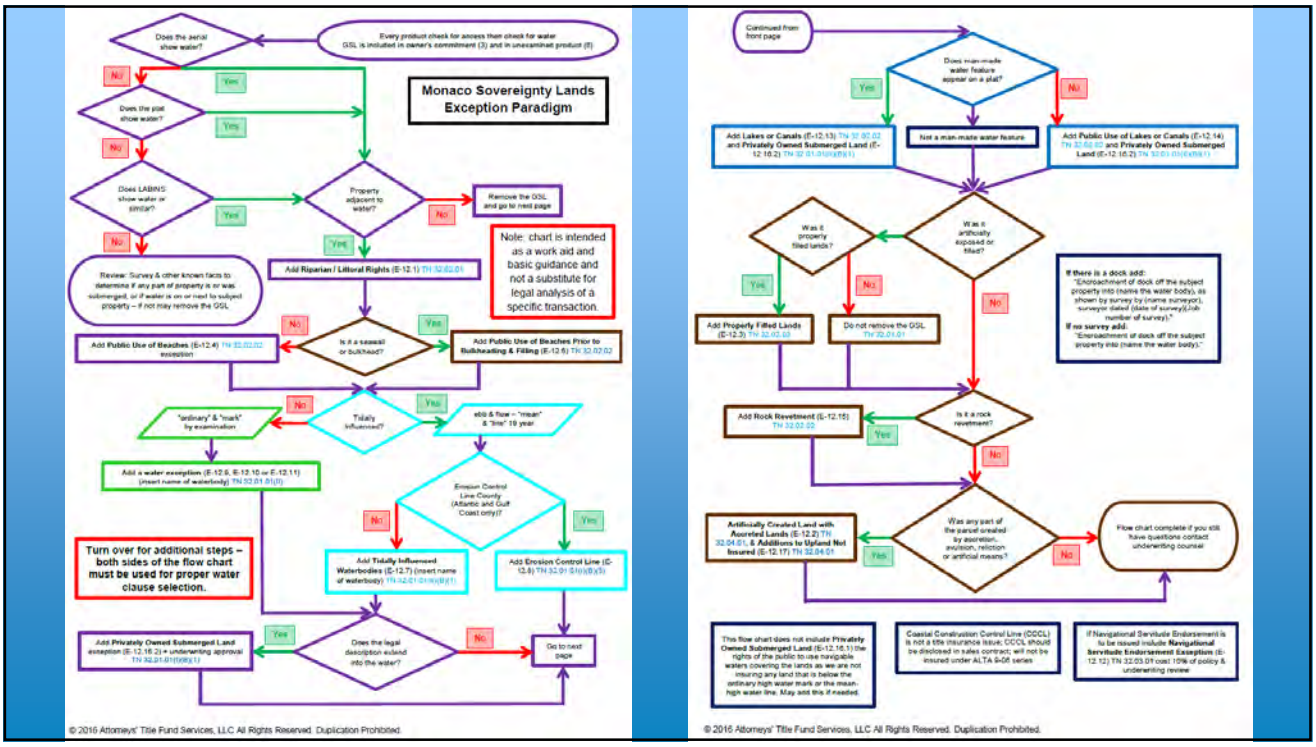
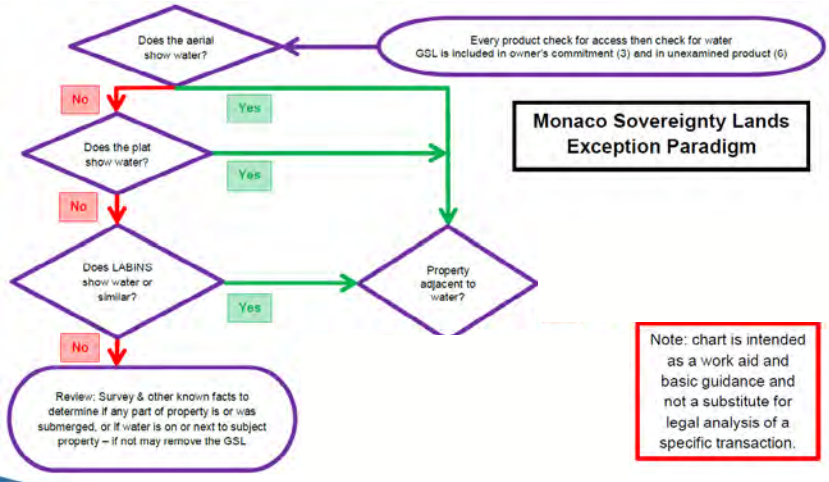


Flowchart
Example 1 Locating Water

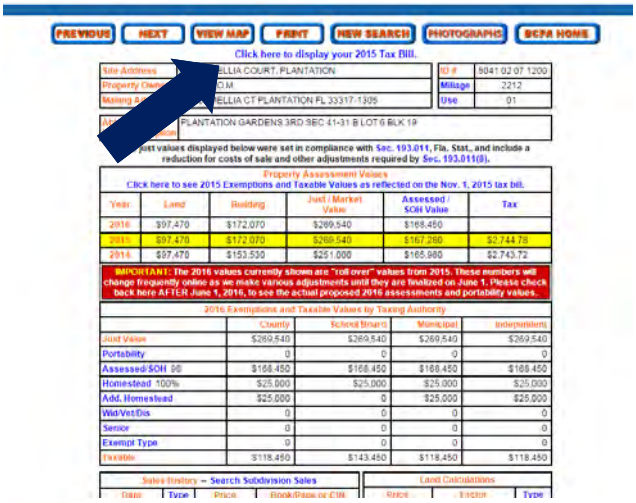


Location of Water Check

- County property appraiser
- Aerial photographs
- Plat
- LABINS
  - Early survey records
  - Historical aerial photographs
- Example 1
  - 860 Camellia Court, Plantation

13

860 Camellia Court, Plantation Broward County Property Appraiser

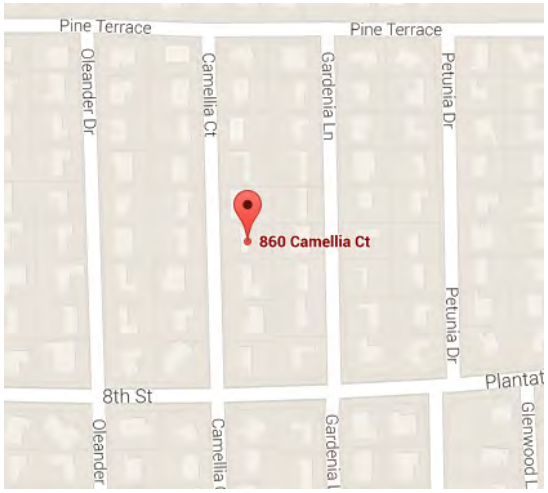


14

860 Camellia Court, Plantation
Broward County Property Appraiser

15

860 Camellia Court, Plantation
Google

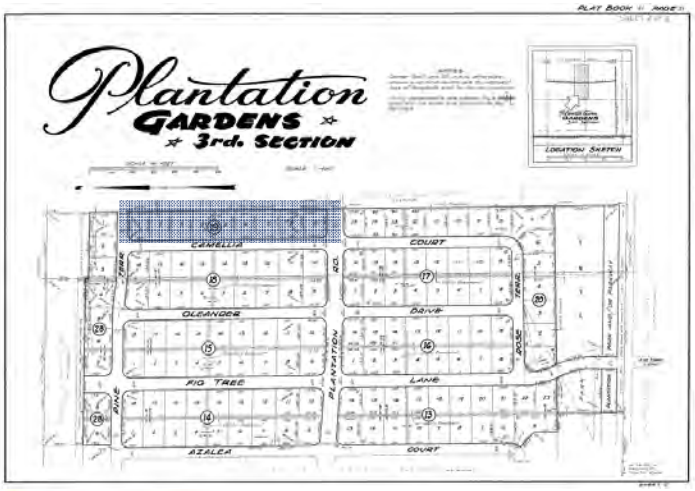


16

860 Camellia Court, Plantation
Plat

17

860 Camellia Court, Plantation; Lot 6, Block 19, of Plantation Gardens Third Section
Plat



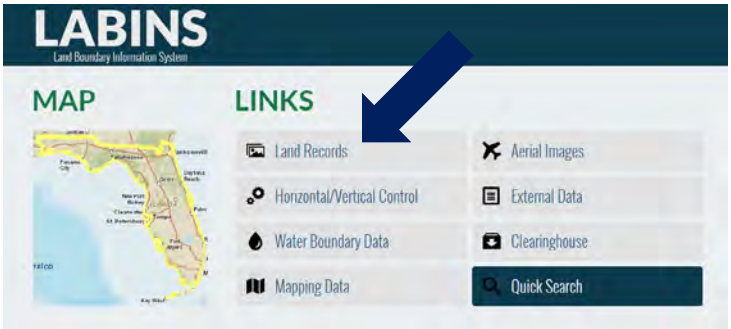
18

860 Camellia Court, Plantation; Lot 6, Block 19, of Plantation Gardens Third Section
Plat

19

860 Camellia Court, Plantation
LABINS

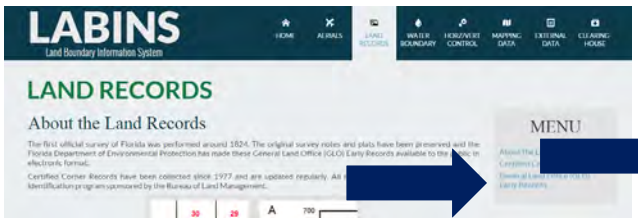
- Check LABINS
  - www.LABINS.org
  - Original government survey



20

860 Camellia Court, Plantation
LABINS

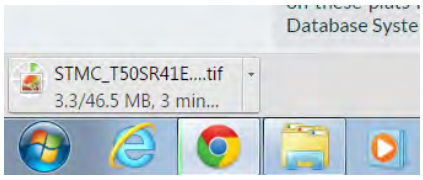
- "General Land Office (GLO) Early Records"

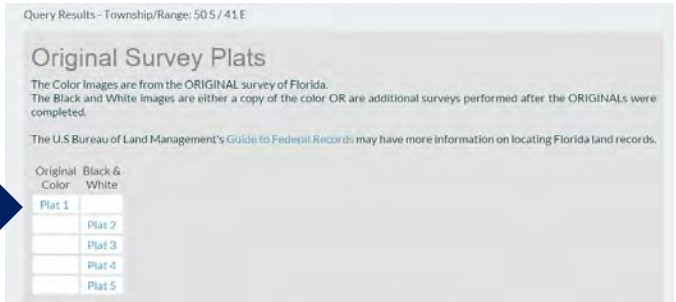


21

860 Camellia Court, Plantation
LABINS

- Enter specific information

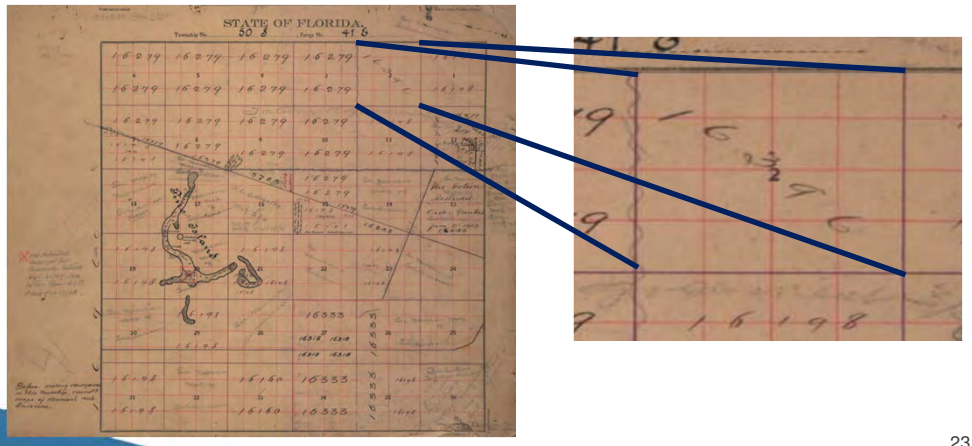




22

860 Camellia Court, Plantation
LABINS

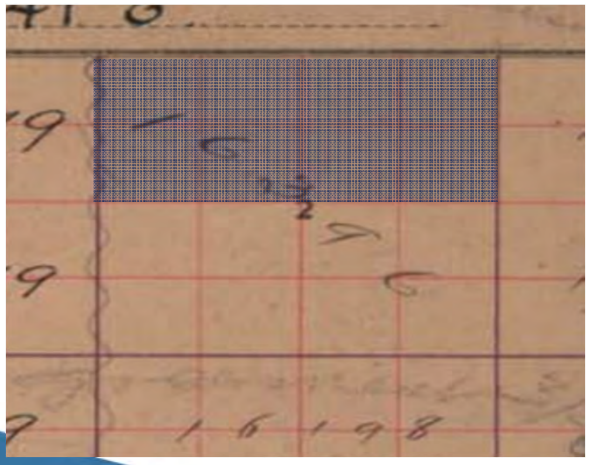
A SUBDIVISION IN THE N. 1/2 OF SECTION 2, TOWNSHIP 50 SOUTH, RANGE 41 EAST
BROWARD COUNTY, FLORIDA



23

860 Camellia Court, Plantation
LABINS

A SUBDIVISION IN THE N. 1/2 OF SECTION 2, TOWNSHIP 50 SOUTH, RANGE 41 EAST
BROWARD COUNTY, FLORIDA



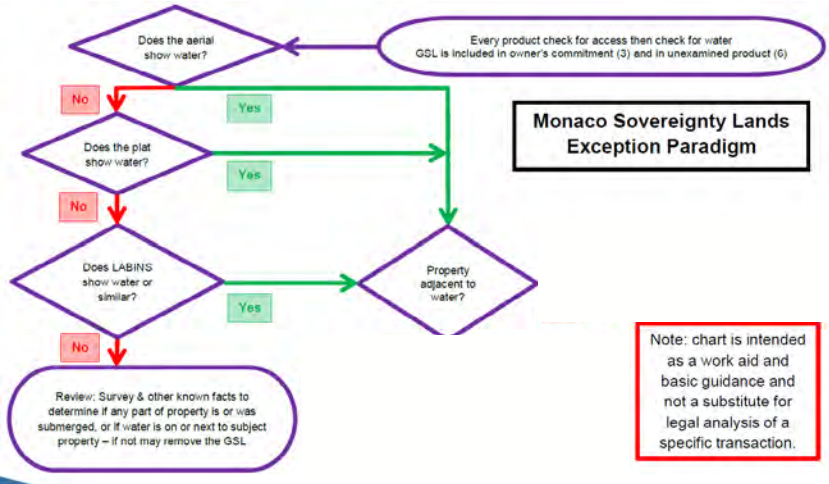
24

860 Camellia Court, Plantation

- First step
  - Review of
    - County appraiser
    - Aerial views
      - Google
      - Zillow or
      - Other
    - Plat
    - LABINS
- Second step
  - Review survey
  - Apply other known facts
  - To determine if any part of the subject property
    - Is submerged, or
    - Was at any time submerged or
    - If there is water upon or
    - Adjacent to the property
- **Then may delete the GSL**

25

Flowchart
Example 2 Addressing Water Issues



26

Example 2
5423 Pasadena Drive, Belle Isle

- Check aerial (Google, Zillow, Trulia, etc.)

27

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the Public Records or attaching subsequent to the Effective Date hereof but prior to the date the Proposed Insured acquires for value of record the estate or interest or Mortgage thereon covered by this Commitment.
2. a. General or special taxes and assessments required to be paid in the year 2017 and subsequent years.
   b. Rights or claims of parties in possession not recorded in the Public Records.
   c. Any encroachment, encumbrance, violation, variation, or adverse circumstance that would be disclosed by an inspection or an accurate and complete land survey of the Land and inspection of the Land.
   d. Easements, or claims of easements, not recorded in the Public Records.
   e. Any lien, or right to a lien, for services, labor, or material furnished, imposed by law and not recorded in the Public Records.
3. Any Owner's Policy issued pursuant hereto will contain under Schedule B the following exception: *Any adverse ownership claim by the State of Florida by right of sovereignty to any portion of the Land insured hereunder, including submerged, filled and artificially exposed lands, and lands accreted to such lands.*

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

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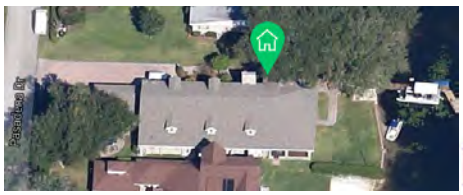
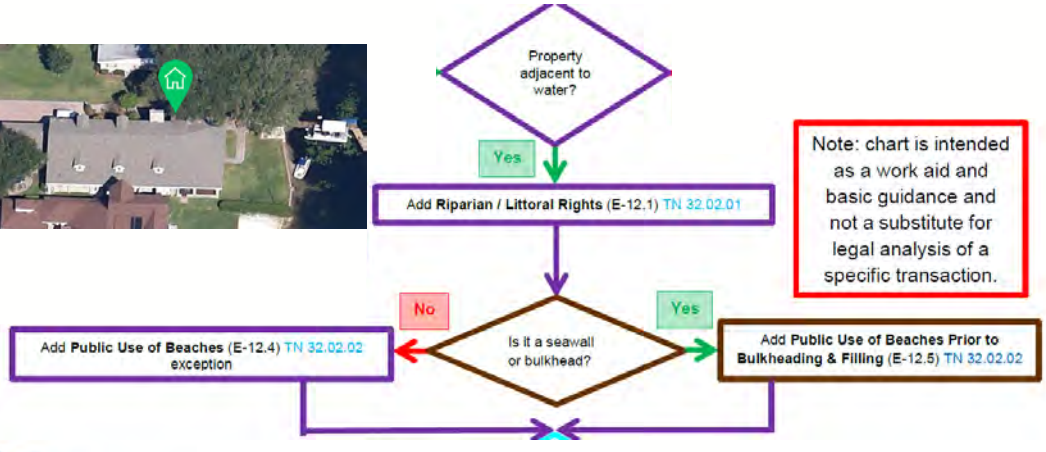
3. INTENTIONALLY DELETED

Flowchart
Land Adjacent to Water





The Fund ALWAYS DRIVEN

30

Land Adjacent to Water Landowner's Rights

- Exception from coverage for riparian/littoral rights
  - Littoral rights – rights which run with the land adjacent to ocean, gulf or lakes
    - Swimming, irrigation, boating, fishing, etc.
  - Riparian rights – rights which run with the land adjacent to rivers or streams
    - Swimming, irrigation, boating, fishing, etc.
- Add "Riparian/Littoral Rights" exception – E-12.01 – TN 32.02.01

31

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   e. Any lien, or right to a lien, for services, labor, or material furnished, imposed by law and not recorded in the Public Records.
3. INTENTIONALLY DELETED
4. Riparian and littoral rights are not insured.

Land Adjacent to Water Public Rights

- Public has a right to use beaches
  - Exception applies if water is
    - Ocean
    - Gulf
    - Bay
    - Lake
    - River, etc.
  - Add proper exception
    - "Public Use of Beaches" (E-12.4) or
    - "Public Use of Beaches Prior to Bulkheading & Filling" (E-12.5)
    - TN 32.02.02

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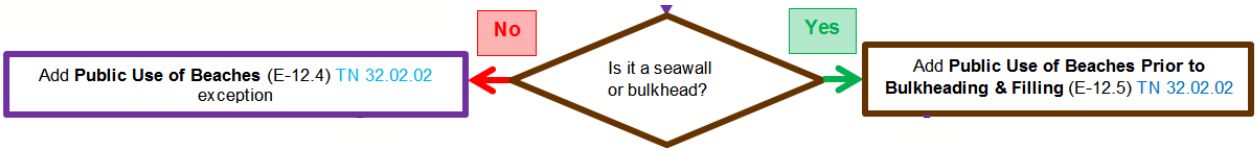
Flowchart Seawall or Bulkhead



34

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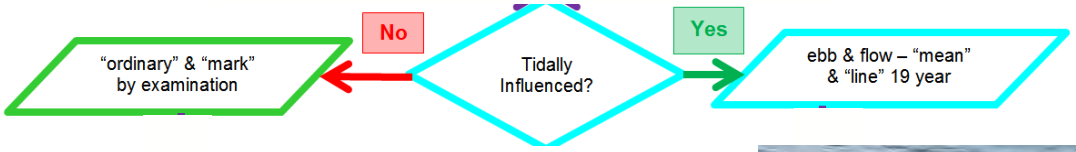
3. INTENTIONALLY DELETED
4. Riparian and littoral rights are not insured.
5. The rights, if any, of the public to use, as a public beach or recreation area, any part of the land lying or formerly lying between the body of water abutting the subject property and the natural line of vegetation, bluff, extreme high-water line or other apparent boundary lines separating the publicly used area from the upland private area, as it may have existed prior to the construction, if any, of sea wall or bulkhead thereon.

Flowchart
Tidally Influenced



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Tidally Influenced

- Affected by the ebb and flow of tides
  - Saltwater
  - Examples
    - Oceans
    - Gulf
    - Bays
    - Intracoastal
    - Brackish water
    - Swamp (sometimes)
    - Rivers (sometimes)
  - Usually larger bodies of water
  - Land beneath mostly acquired at statehood
- Exception to include "**mean-high water line**"

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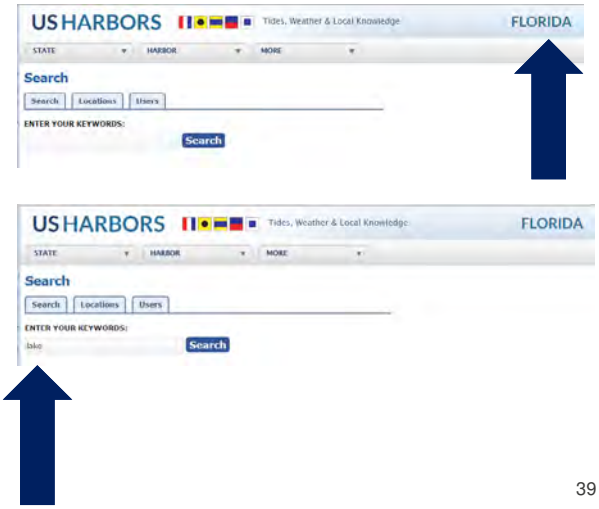
Non-tidally Influenced

- Not effected by ebb and flow of tides
  - Freshwater
  - Examples
    - Lakes (Statehood)
    - Rivers (Statehood) (usually)
    - Streams (Statehood) (usually)
    - Ponds (Statehood) (usually)
    - Swamp (1850) (usually)
  - Land beneath mostly acquired at statehood if navigable
- Exception to include "**ordinary high water mark**"

38

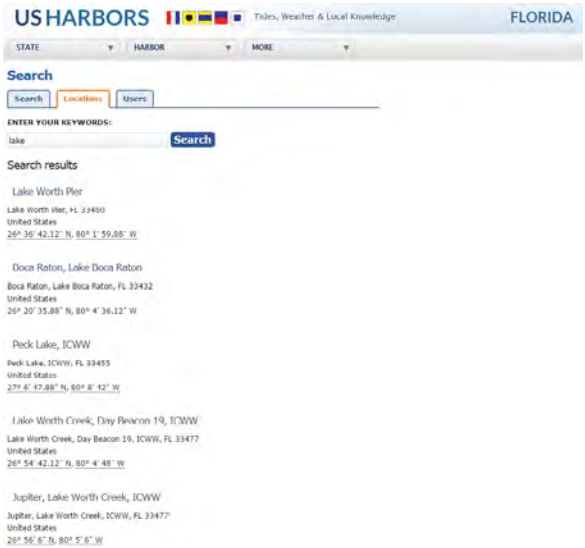
Tidally Influenced or Not?

- Tide charts – www.usharbors.com



Tidally Influenced or Not?

- Tide charts – www.usharbors.com
- Lake Conway not listed
  - Not-tidally influenced



Ordinary High Water Mark Defined by Case Law

- "A high water mark, as a line between the riparian owner and the public, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation as well as respects the nature of the soil itself."
- ADDITIONALLY . . .

41

Ordinary High Water Mark Determination

- Surveyors can not define the ordinary high water mark by rule
- Only courts may determine upon facts and circumstance
- If the subject land abuts fresh water use the proper exception
- If the lake or pond is very small, underwriting counsel may be able to delete the exception

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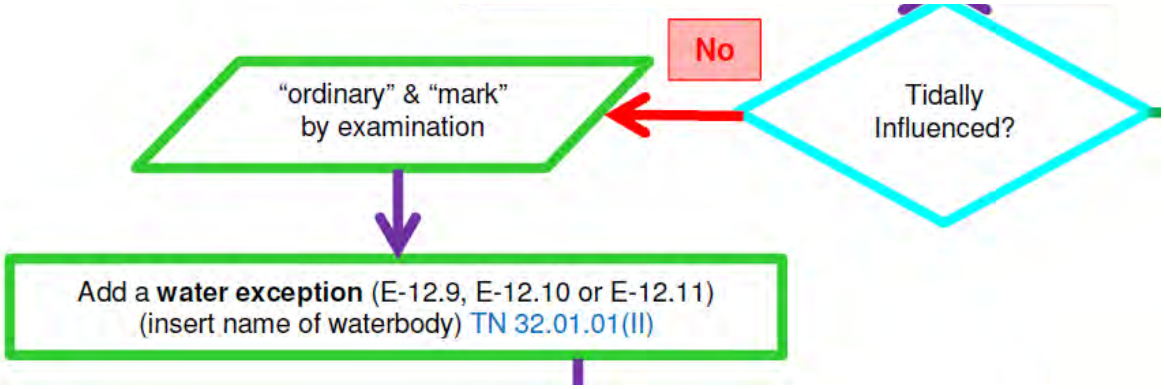
Flowchart
Non-Tidally Influenced



43

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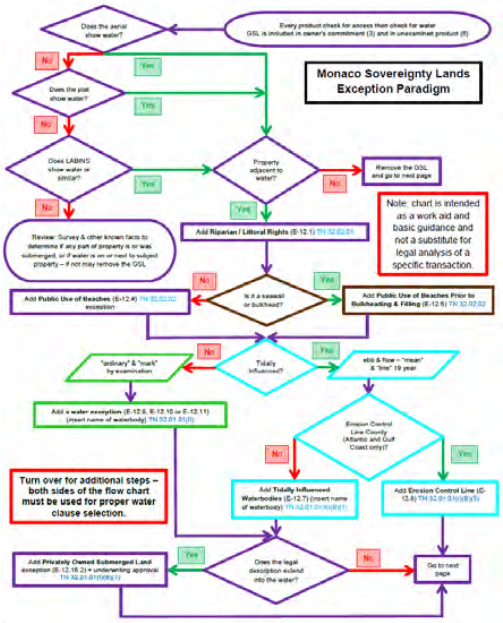
6. This policy does not insure any portion of the insured parcel lying waterward of the ordinary high water mark of Lake Conway.

Flowchart Front Page



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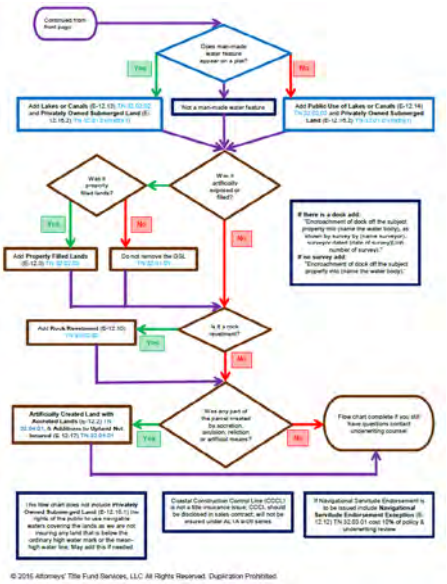
Flowchart Back Page



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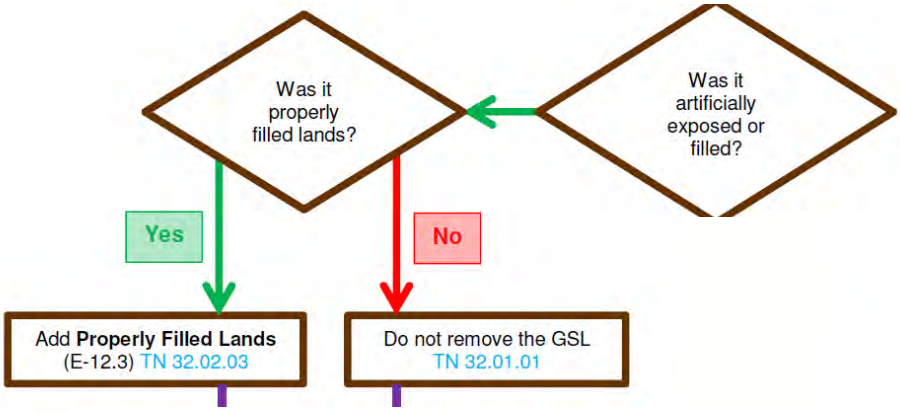
Flowchart
Filled Lands



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Filled Lands

- Lands filled during the time permitted by law can be property filled lands
  - Deemed owned by upland owner
- Lands filled outside during the time permitted by law remain the property of the State of Florida
- Butler Act of 1921, repealed by implication 1951, expressly repealed by "Bulkhead Act" of 1957
  - Allowed upland riparian owner to obtain title to filled lands
  - Only applied to
    - Bulkheaded lands
    - Filled-in lands
    - Permanently improved lands

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Properly Filled Lands Criteria Tidally Influenced

- Filling complete by July 1, 1975
  - Check historical aerial photographs on LABINS
    - www.LABINS.org
- Upland owner who did the filling was not the upland owner on January 1, 1993
- Cannot be
  - "Spoil island" – islands created from dredging
  - Lands on the state's official acquisition list as of July 1, 1993
  - Lands maintained as a state or local recreation area or
  - Shore protection structure

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Properly Filled Lands Criteria Non-Tidally Influenced

- Lands non-tidally influenced
- No special grandfathering
- Owner would have to receive title in the form of TIIF deed

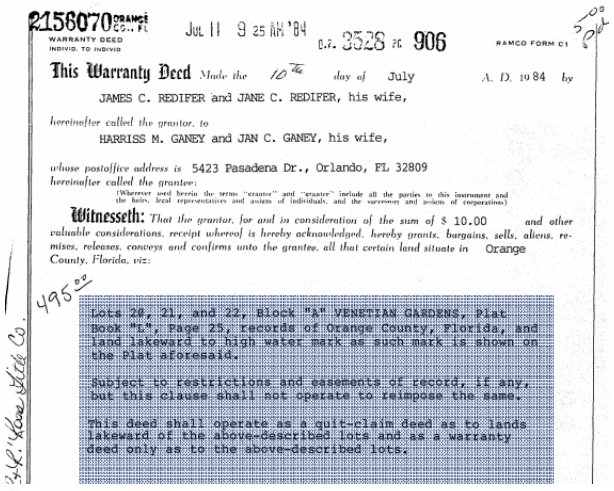
50

Transfer of Properly Filled Lands Via Deed

- Conveyance from sovereign submerged lands must:
  - Clear intent
  - Authority
  - Specifically mention submerged lands
  - Public still has right to use water
  - Will be closely scrutinized by courts
    - Doubt or ambiguity will be found in favor of the state
    - Pre-1919, TIIF could not convey sovereign lands, only the legislature could convey

51

TIIF Deed Search Deed



2156070 ORANGE CO., FL
WARRANTY DEED
INDIVID. TO INDIVID

Jul 11 9 25 AM '84

O.R. 3528 PG 906

RAMCO FORM C1

This Warranty Deed *Made the* 10th *day of* July *A. D.* 1984 *by*

JAMES C. REDIFER and JANE C. REDIFER, his wife,

hereinafter called the grantor, to

HARRISS M. GANEY and JAN C. GANEY, his wife,

whose postoffice address is 5423 Pasadena Dr., Orlando, FL 32809
hereinafter called the grantee:

(Wherever used herein the terms "grantor" and "grantee" include all the parties to this instrument and the heirs, legal representatives and assigns of individuals, and the successors and assigns of corporations)

Witnesseth: *That the grantor, for and in consideration of the sum of* $ 10.00 *and other valuable considerations, receipt whereof is hereby acknowledged, hereby grants, bargains, sells, aliens, remises, releases, conveys and confirms unto the grantee, all that certain land situate in* Orange *County, Florida, viz:*

495.00

Lots 20, 21, and 22, Block "A" VENETIAN GARDENS, Plat Book "L", Page 25, records of Orange County, Florida, and land lakeward to high water mark as such mark is shown on the Plat aforesaid.

Subject to restrictions and easements of record, if any, but this clause shall not operate to reimpose the same.

This deed shall operate as a quit-claim deed as to lands lakeward of the above-described lots and as a warranty deed only as to the above-described lots.

J.R. Abstract Co.

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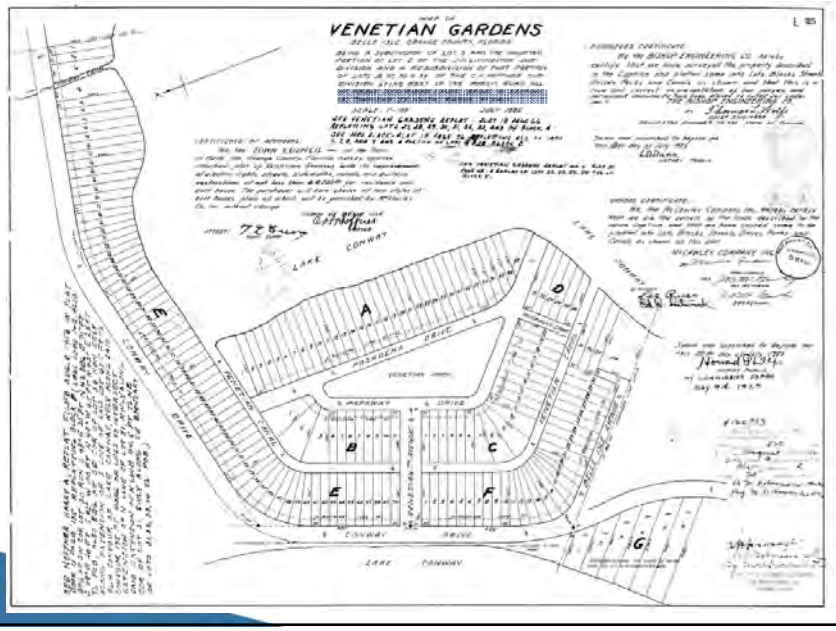
TIIF Deed Search Plat



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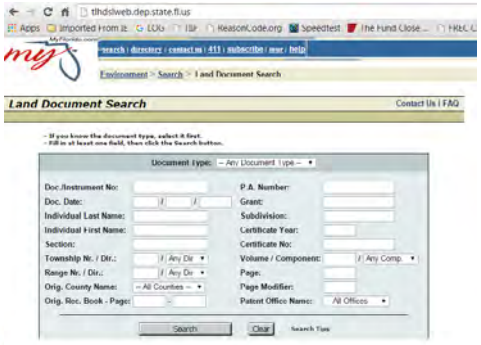
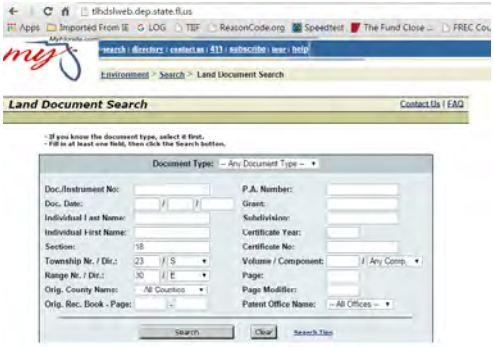
TIIF Deed Search

- Land document search - http://tlhdslweb.dep.state.fl.us/
  - TIIF (Trustees of the Internal Improvement Trust Fund) Deed





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TIIF Deed Search

Results List

Contact Us | FAQ

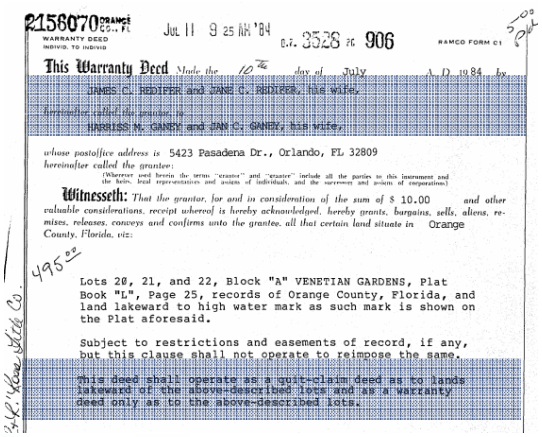
New Search

Click on a Document ID to view the full land document information.

Go to Page: 1 2 3

View Mc	DM ID	Doc Type	Doc/ Instr. #	Doc Date	Individual	County	Sect Township / Rng
	200196	RBE		02/14/1996	Gr TITF Ge WILDUR L HALLOCK Ge HELEN S HALLOCK	ORANGE	18 - 23S / 30E
	263707	SFT			Te WILLIAM B RANDO	ORANGE	18 - 23S / 30E 19 - 23S / 30E
	263704	SFT			Te DAVID MIZELL	ORANGE	18 - 23S / 30E 20 - 23S / 30E
	263608	SFT			Te BENJ F WHITNER	ORANGE	18 - 23S / 30E
	145635	TFI	22022	12/29/1958	Gr TITF Ge LAKE CONWAY WATER & NA	ORANGE	13 - 23S / 29E 24 - 23S / 29E 18 - 23S / 30E
	126232	TFI	20535	12/15/1953	Gr TITF Ge ARTHUR H PARK Ge REBECCA LELAND PARK	ORANGE	18 - 23S / 30E
	131664	TFI	23869	11/03/1964	Gr TITF Ge IOLA MAY P MATTHEWS Ge WILLIAM J MATTHEWS	ORANGE	18 - 23S / 30E
	126159	TFI	20218	10/29/1952	Gr TITF Ge RALPH PRIEP	ORANGE	18 - 23S / 30E
	126180	TFI	20197	10/15/1952	Gr TITF Ge FRANK A FRENCH Ge ELGARDA P FRENCH	ORANGE	18 - 23S / 30E
	131366	TFI	22601	10/14/1960	Gr TITF Ge THOMAS J HOBBS Ge PEARL ANN HOBBS	ORANGE	18 - 23S / 30E
	142045	TFI	26294	10/13/1592	Gr TITF Ge CITY OF BELLE ISLE	ORANGE	24 - 23S / 29E 25 - 23S / 29E 19 - 23S / 30E 30 - 23S / 30E
	126186	TFI	20188	10/07/1952	Gr TITF Ge LAVINA HENRY	ORANGE	19 - 23S / 30E
	131617	TFI	24081	10/01/1965	Gr TITF Ge RUDOLPH H JOHNSON Ge AMELIA J JOHNSON	ORANGE	19 - 23S / 30E
	128115	TFI	20492	09/23/1953	Gr TITF Ge HARRY A HOFFNER	ORANGE	18 - 23S / 30E
	128976	TFI	21369	09/20/1956	Gr TITF Ge ATCO PROPERTIES, INC	ORANGE	18 - 23S / 30E
	127857	TFI	20172	09/19/1952	Gr TITF Ge HERMAN L IRWIN Ge CHARITY MAE IRWIN	ORANGE	19 - 23S / 30E
	126968	TFI	19182	08/29/1948	Gr TITF Ge J W NASH	ORANGE	18 - 23S / 30E
	127886	TFI	20158	08/27/1952	Gr TITF Ge TED C HOFFNER Ge WINNIE N HOFFNER	ORANGE	18 - 23S / 30E
	126049	TFI	20473	08/24/1953	Gr TITF Ge MADGE H MERLOCK	ORANGE	18 - 23S / 30E 19 - 23S / 30E
	126094	TFI	20474	08/24/1953	Gr TITF Ge FENA I HOFFNER	ORANGE	18 - 23S / 30E 19 - 23S / 30E
	127794	TFI	19864	08/19/1951	Gr TITF	ORANGE	18 - 23S / 30E

TIIF Deed Search



2156070 ORANGE CO., FL
WARRANTY DEED
INDIVID. TO INDIVID

Jul 11 9 25 AM '84 O.R. 3528 PG 906

RAMCO FORM C1

This Warranty Deed Made the 10th day of July A.D. 1984 by

JAMES C. REDIFER and JANE C. REDIFER, his wife,

hereinafter called the grantor, to

HARRIS M. GANDY and JAN C. GANDY, his wife,

whose postoffice address is 5423 Pasadena Dr., Orlando, FL 32809

hereinafter called the grantee:

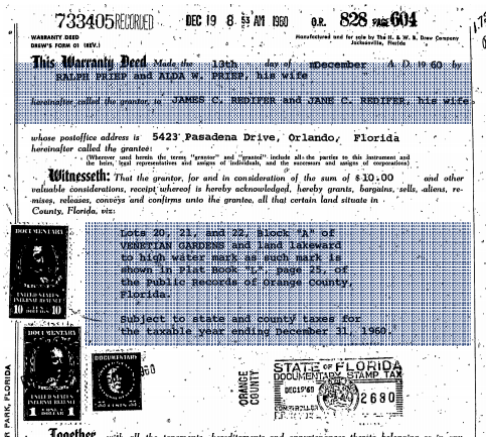
(Wherever used herein the terms "grantor" and "grantee" include all the parties to this instrument and the heirs, legal representatives and assigns of individuals, and the successors and assigns of corporations)

Witnesseth: That the grantor, for and in consideration of the sum of $ 10.00 and other valuable considerations, receipt whereof is hereby acknowledged, hereby grants, bargains, sells, aliens, remises, releases, conveys and confirms unto the grantee, all that certain land situate in Orange County, Florida, viz:

Lots 20, 21, and 22, Block "A" VENETIAN GARDENS, Plat Book "L", Page 25, records of Orange County, Florida, and land lakeward to high water mark as such mark is shown on the Plat aforesaid.

Subject to restrictions and easements of record, if any, but this clause shall not operate to reimpose the same.

This deed shall operate as a quit-claim deed as to lands lakeward of the above-described lots and as a warranty deed only as to the above-described lots.



733405 RECORDED DEC 19 8 53 AM 1960 O.R. 828 PAGE 604

WARRANTY DEED
DRAW'S FORM 01 (REV.)

Manufactured and for sale by The H. & W. B. Drew Company Jacksonville, Florida

This Warranty Deed Made the 13th day of December A. D. 19 60 by

RALPH PRIEP and ALDA W. PRIEP, his wife

hereinafter called the grantor, to JAMES C. REDIFER and JANE C. REDIFER, his wife,

whose postoffice address is 5423 Pasadena Drive, Orlando, Florida

hereinafter called the grantee:

(Wherever used herein the terms "grantor" and "grantee" include all the parties to this instrument and the heirs, legal representatives and assigns of individuals, and the successors and assigns of corporations)

Witnesseth: That the grantor, for and in consideration of the sum of $10.00 and other valuable considerations, receipt whereof is hereby acknowledged, hereby grants, bargains, sells, aliens, remises, releases, conveys and confirms unto the grantee, all that certain land situate in County, Florida, viz:

Lots 20, 21, and 22, Block "A" of VENETIAN GARDENS and land lakeward to high water mark as such mark is shown in Plat Book "L", page 25, of the Public Records of Orange County, Florida.

Subject to state and county taxes for the taxable year ending December 31, 1960.

DOCUMENTARY STAMP TAX DEC 19 1960 10

ORANGE COUNTY

STATE OF FLORIDA DOCUMENTARY STAMP TAX DEC 19 1960 2680

Together

TIIF Deed Search

- Ralph Priep and Alda W. Priep

	129073	TFI	21502	02/27/1957	Gr: TIITF Ge: FRANK I ANDERSON	ORANGE	18 - 23S / 30E
	128675	TFI	21142	02/27/1956	Gr: TIITF Ge: LAKE CONWAY LAND DEVEL	ORANGE	7 - 23S / 30E 18 - 23S / 30E
	125974	TFI	20290	02/18/1953	Gr: TIITF Ge: FELIX E REIFSCHNEIDER	ORANGE	18 - 23S / 30E
	127107	TFI	19397	02/11/1948	Gr: TIITF Ge: K M MAGARIAN	ORANGE	18 - 23S / 30E
	127955	TFI	20282	02/09/1953	Gr: TIITF Ge: RALPH PRIEP Ge: ALDA W PRIEP	ORANGE	18 - 23S / 30E

Gr = GRANTOR
Ge = GRANTEE

Go to Page: 1 2 3

TIIF Deed

Trustees of the Internal Improvement Fund
of the State of Florida

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, the Trustees of the Internal Improvement Fund of the State of Florida, under authority of law, for and in consideration of the sum of Sixty-nine and 00/100 - - -

TIIF Deed

All of Lots 20 and 21, Block "A", VENETIAN GARDENS, a subdivision in Section 18, Township 23 South, Range 30 East, as shown by Plat thereof as recorded in Plat Book "L", page 25 of the Public Records of Orange County, Florida, which lie entirely lakeward of the ordinary high water mark of Lake Conway, containing 0.23 of an acre, more or less, lying and being in Orange County, Florida.

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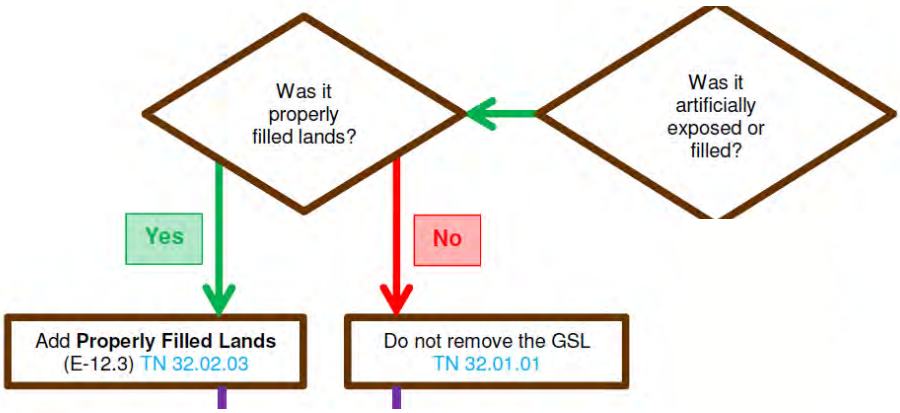
Flowchart
Filled Lands



60

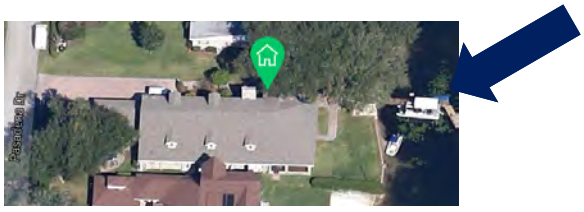
II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the Public Records or attaching subsequent to the Effective Date hereof but prior to the date the Proposed Insured acquires for value of record the estate or interest or Mortgage thereon covered by this Commitment.
2. a. General or special taxes and assessments required to be paid in the year 2017 and subsequent years.
   b. Rights or claims of parties in possession not recorded in the Public Records.
   c. Any encroachment, encumbrance, violation, variation, or adverse circumstance that would be disclosed by an inspection or an accurate and complete land survey of the Land and inspection of the Land.
   d. Easements, or claims of easements, not recorded in the Public Records.
   e. Any lien, or right to a lien, for services, labor, or material furnished, imposed by law and not recorded in the Public Records.
3. INTENTIONALLY DELETED
4. Riparian and littoral rights are not insured.
5. The rights, if any, of the public to use, as a public beach or recreation area, any part of the land lying or formerly lying between the body of water abutting the subject property and the natural line of vegetation, bluff, extreme high-water line or other apparent boundary lines separating the publicly used area from the upland private area, as it may have existed prior to the construction, if any, of sea wall or bulkhead thereon.
6. This policy does not insure any portion of the insured parcel lying waterward of the ordinary high water mark of Lake Conway.
7. Those portions of the property herein described being artificially filled in land in what was formerly navigable waters, are subject to the right of the United States Government arising by reason of the United States Government control over navigable waters in the interest of navigation and commerce.

Flowchart
Dock

If there is a dock add:
"Encroachment of dock off the subject property into (name the water body), as shown by survey by (name surveyor), surveyor dated (date of survey)(Job number of survey)."

If no survey add:
"Encroachment of dock off the subject property into (Name the water body)."



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62

Dock

- If there is a dock add exception:
  - "Encroachment of dock off the subject property into (name the water body), as shown by survey by (name surveyor), surveyor dated (date of survey)(Job number of survey)."
- If no survey add:
  - "Encroachment of dock off the subject property into (Name the water body)."
- TN 8.05.05(C)
- Insuring Boat Docks and Boat Slips, 38 *Fund Concept* 121 **(MONTH** 2006)

63

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

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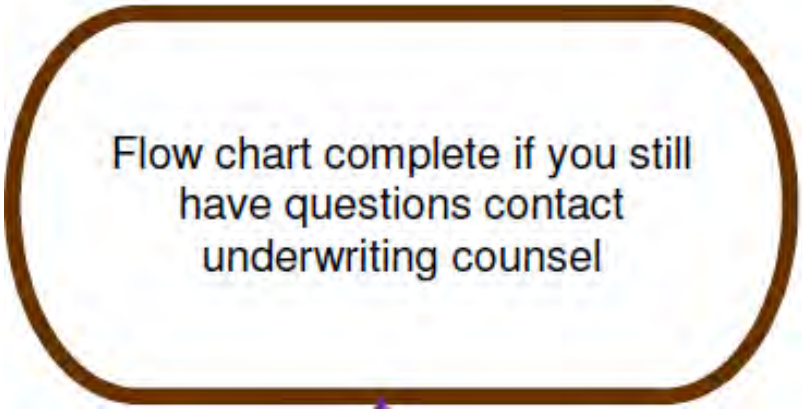
8. Encroachment of dock off the subject property into Lake Conway

Flowchart



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Commitment Is Complete

FUND ASSEMBLY
MAY 5-7 2016

- Subject property is near water
- "INTENTIONALLY DELETED" the GSL
- Added specific water exceptions
- Need to review survey
  - For additional exceptions
  - To determine if some exceptions are not necessary

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II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the Public Records or attaching subsequent to the Effective Date hereof but prior to the date the Proposed Insured acquires for value of record the estate or interest or Mortgage thereon covered by this Commitment.
2. a. General or special taxes and assessments required to be paid in the year 2017 and subsequent years.
   b. Rights or claims of parties in possession not recorded in the Public Records.
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8. Encroachment of dock off the subject property into Lake Conway.

Resources

FA FUND ASSEMBLY
MAY 5-7 2016

- List of resources
  - Internet websites
  - Florida Statues
  - Cases
  - Fund resources
    - Flowchart
    - Sovereignty lands definitions
    - Cross-reference chart

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FUND ASSEMBLY
MAY 5-7 2016

Thank you!

Resources

I. Internet websites
   A. LABINS – www.LABINS.org
      1. Historical surveys
      2. Historical aerials
   B. http://tlhdslweb.dep.state.fl.us/
      1. Land document search TIIF Deed
      2. (Trustees of the Internal Improvement Trust Fund)
   C. County websites
   D. Army Corp of Engineers – www.usace.army.mil/
   E. Aerials
      1. www.Google.com
      2. www.Zillow.com
      3. www.Trulia.com

II. Florida Statues
   A. Article X, s. 11, Florida Constitution
   B. Riparian Rights Act of 1856, repealed 1921
   C. Butler Act of 1921, repealed by implication 1951, repealed by statute 1957
   D. FLA. STAT. CH. 161 – Beach and Shore Preservation
   E. FLA. STAT. CH. 253 – State Lands
   F. FLA. STAT. CH. 258 – State Parks and Preserves
   G. FLA. STAT. CH. 373 – Water Resources
   H. FLA. STAT. § 26.012 – Jurisdiction of Circuit Court
   I. FLA. STAT. § 177.25-177.40 – Land Boundaries
      1. FLA. STAT. § 177.27(14) - definition "mean high water"

III. Cases
   A. Navigability
      1. *The Daniel Ball*, 77 U.S. 557 (1870).
      2. *Bucki v. Cone*, 6 So. 160 (Fla. 1889).
      3. *Broward v. Mabry*, 50 So. 826 (Fla. 1909).
      4. *Clement v. Watson*, 58 So. 25 (Fla. 1912).
      5. *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1977).
   B. Conveyance
      1. *Sullivan v. Richardson*, 14 So. 692 (Fla. 1894).
      2. *State ex rel. Ellis v. Gerbing*, 47 So. 353 (Fla. 1908).
      3. *City of W. Palm Beach v. Bd. of Tr. of Internal Improvement Trust Fund,* 714 So. 2d 1060 (Fla. 1998).
      4. *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So.2d 339 (Fla. 1986).
      5. *Phillips Petroleum Co. v. Miss.*, 108 S.Ct. 791 (1988).
   C. Boundry
      1. *Martin v. Busch*, 112 So. 274 (Fla. 1927).
      2. *Tilden v. Smith*, 113 So. 708 (Fla. 1927).

3. *Bd. of Tr. of Internal Improvement Trust Fund v. Bd. of Prof'l Land Surveyors*, 566 So. 2d 1358 (Fla. 1st DCA 1990).
4. *Mexico Beach Corp. v. St. Joe Paper Co.*, 97 So. 2d 708 (Fla. 1st DCA 1957).

D. Upland rights
1. *City of Daytona Beach v. Tona-Rama, Inc.,* 294 So. 2d. 73 (Fla. 1974).

IV. Fund resources

A. *Concept* articles
1. Claims of State Sovereignty Lands – Pandora's Box Opened?, 18 *Fund Concept* 65 (Sept. 1986).
2. Sovereignty Lands - Exceptions Required in Fund Policies, 22 *Fund Concept* 49 (June 1990).
3. Navigational Servitude Endorsement, 23 *Fund Concept* 65 (July 1991).
4. Insuring Filled Lands, 25 *Fund Concept* 73 (June 1993).
5. The Effect of Spanish Land Grants on Sovereignty Lands, 27 *Fund Concept* 7 (Jan. 1995).
6. Improvements Under the Butler Act Defined, 28 *Fund Concept* 147 (Oct. 1996).
7. Riparian Rights Are Not Insurable, 29 *Fund Concept* 179 (Dec. 1997).
8. Insuring Boat Docks and Boat Slips, 38 *Fund Concept* 121 (Sept. 2006).
9. Good Things to Know About Insuring Filled Lands, 45 *Fund Concept* 49 (June 2013).
10. Demystifying Water Rights: The General Sovereignty Lands Exception, 47 *Fund Concept* 179 (Nov. 2015).

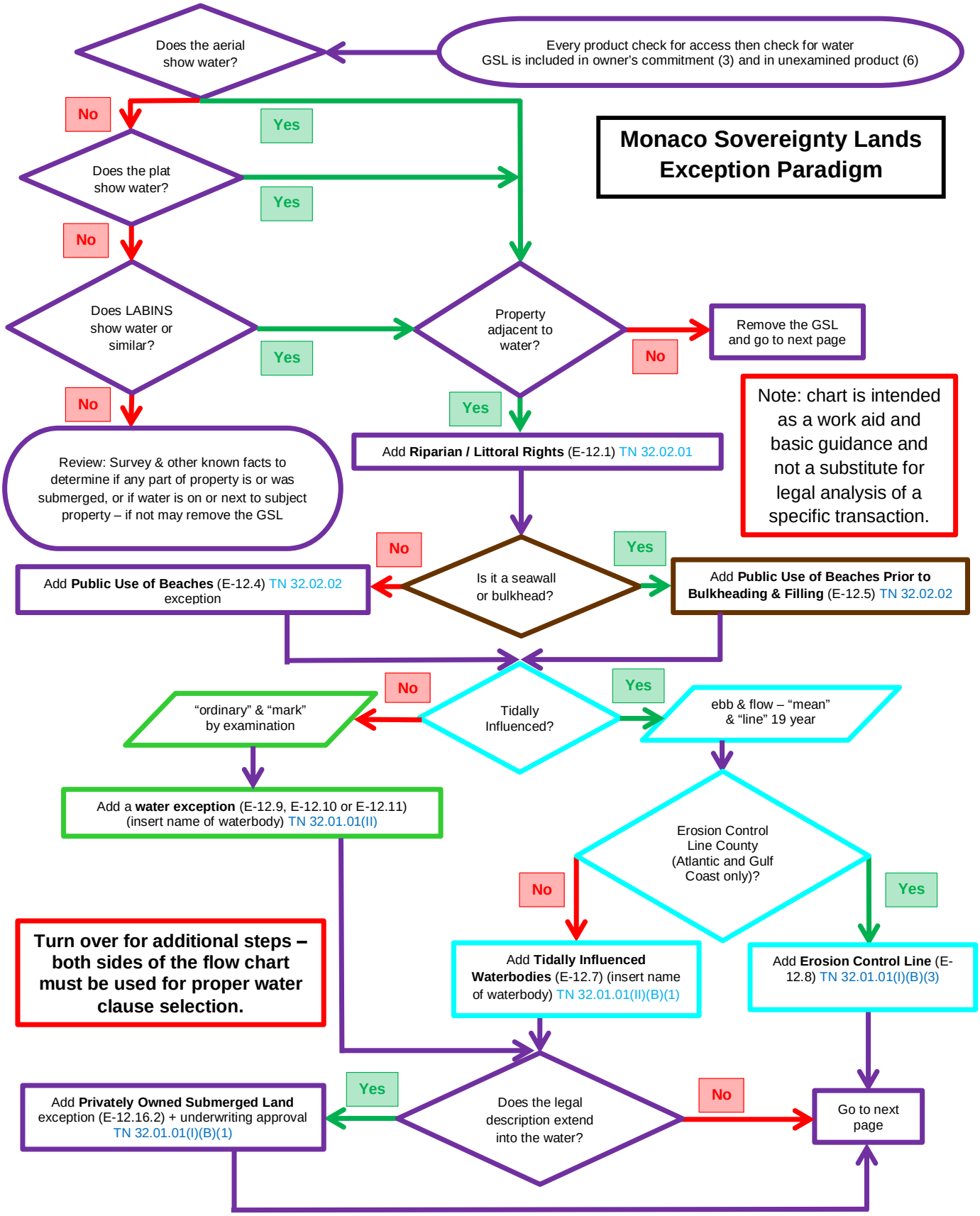
B. Title Notes
1. Chapter 26
   a) TN 26.01.01 – TIIF Deed
2. Chapter 32

C. Standard Commitment Clause Handbook
1. Chapter 3
   a) L. E-12.1 through E-12.17

D. Flowchart

E. Definitions

F. Cross-reference chart



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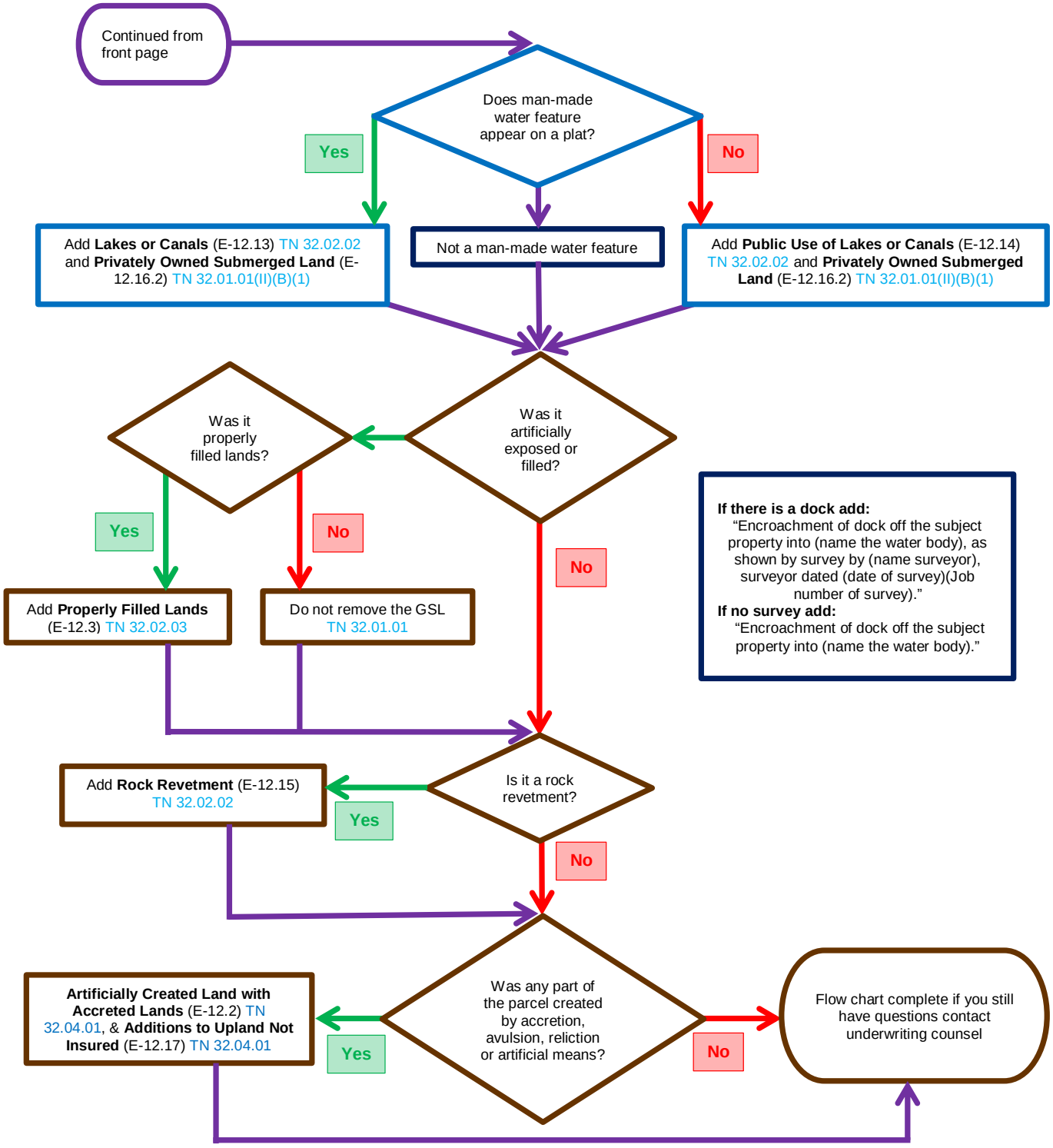

This flow chart does not include **Privately Owned Submerged Land** (E-12.16.1) the rights of the public to use navigable waters covering the lands as we are not insuring any land that is below the ordinary high water mark or the mean-high water line. May add this if needed.

Coastal Construction Control Line (CCCL) is not a title insurance issue; CCCL should be disclosed in sales contract; will not be insured under ALTA 9-06 series

If Navigational Servitude Endorsement is to be issued include **Navigational Servitude Endorsement Exception** (E-12.12) TN 32.03.01 cost 10% of policy & underwriting review

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Sovereignty Lands Definitions

a. **Accretion** – extension of land due to natural, gradual and imperceptible addition of material.

b. **Artificially exposed** – lands which are exposed due to the course of water or water body having been artificially altered (e.g. dam).

c. **Avulsion** – sudden, perceptible addition of sand or sediment caused by a natural event.

d. **Erosion control line** – in some counties this line is established and replaces the high water line as the boundary between private and state-owned lands.

e. **Equal Footing Doctrine** – Constitutional doctrine that states admitted to the United States did so on "equal footing" with the 13 colonies that formed the United States. Since the original colonies retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, newly admitted states retained that same sovereignty and jurisdiction. If this were not the case, there would need to be deeds from the United States as to those lands.

f. **Filled lands** – lands artificially filled – may be found near tidally influenced water – state may or may not have given up its interest but the United States did not give up their interest as to control of navigation rights.

g. **General Sovereignty Lands (GSL) exception** – an exception to owner's title policy coverage based upon the difficulty of ascertaining historical facts about the artificial alteration of water features by dredging, filling, draining, pumping, and other means. Also used as a reminder to check for water issues on the subject property.

h. **Littoral rights** – rights which run with the land adjacent to ocean, gulf or lakes up to the high water mark as established over 19 years (e.g. landowner's right to use the water for swimming, irrigation, boating, fishing, etc.).

i. **Meandered lakes** – one hundred-ninety lakes which were surveyed all the way around at the shoreline (not the boundary) at time of Florida's statehood, presumed to be navigable. Just because a lake was not meandered does not mean that the lake is not navigable.

j. **Meandered rivers** – rivers which were surveyed at the banks (not the boundary) at the time of statehood, presumed to be navigable. Just because a river was not meandered does not mean that the river is not navigable.

k. **Navigable**

River, stream or creek – able to float a product to market in 1845.

Lakes – fresh water lakes are presumed to have been navigable in 1845.

l. **Navigable for commercial purposes** – could it have been used for commercial purposes at the time of statehood? If it is dry now – what was it then? If so, it belongs to the state.

m. **Non-tidally influenced** – waters not influenced by the ebb and flow of the tides.

n. **Reliction** – lands which were covered by water and are now dry through natural, imperceptible recession of water.

o. **Riparian rights** – rights which run with the land adjacent to rivers or streams (e.g. landowner's right to use the water for swimming, irrigation, boating, fishing, etc.).

p. **Rock revetment** – rocks used to protect an embankment (e.g. jetty).

q. **Seawall or bulkhead** – strong wall of embankment to prevent encroachments of the sea.

r. **Sovereignty lands** – lands owned by the State of Florida or the United States.

s. **Spoiler islands** – islands created from dredged materials.

t. **Submerged lands** – lands under water.

u. **Tidally influenced water** – water subject to the ebb and flow of the tides.

v. **TIIF** (Trustees of the Internal Improvement Trust Fund) **deed** – a deed from the state to private ownership – needs to specifically transfer submerged lands to so transfer.

SCC Number	Name	Title Note
E-12.17	Additions to Upland Not Insured	32.04
E-12.1	Riparian / Littoral Rights	32.02.01
E-12.2	Artificially Created Land with Accreted Lands	32.04.01
E-12.3	Property Filled Lands (Navigational Servitude Exception)	32.02.03
E-12.4	Public Use of Beaches	32.02.02
E-12.5	Public Use of Beaches Prior to Bulkheading and Filling	32.02.02
E-12.6	Improperly Filled or Sovereignty Submerged Lands (General Sovereignty Lands Exception)	32.01.01
E-12.7	Tidally Influenced Water Bodies (Tidally Influenced Lands)	32.01.01(B)(1)
E-12.8	Erosion Control Line (Tidally Influenced Lands)	32.01.01.(B)(3)
E-12.9	Non-Meandered Lakes	
E-12.10	Non-Tidally Influenced River (Lands Affected by Freshwater Bodies of Water)	32.01.01
E-12.11	Streams and Creeks (Lands Affected by Freshwater Bodies of Water)	32.01.01
E-12.12	Navigational Servitude Endorsement Exception	32.03.01
E-12.13	Lakes or Canals	
E-12.14	Public Use of Lakes or Canals	
E-12.15	Rock Revetment	
E-12.16.1	Privately Owned Submerged Land – Public – (Tidally Influenced Lands)	32.01.01(B)(1)
E-12.16.2	Privately Owned Submerged Land – State – (Tidally Influenced Lands	32.01.01(B)(1)

Back to Speaker Topics

FUND ASSEMBLY 2016

QUIZ ON RECENT REAL PROPERTY CASES

Connie Clark, Fund Sr. Underwriting Counsel

Back to Speaker Topics

SPEAKER INFORMATION

QUIZ ON RECENT REAL PROPERTY CASES

Connie Clark
Fund Sr. Underwriting Counsel

Connie Clark is a Senior Underwriting Counsel with The Fund. She discovered her love of real property law while sitting in classes taught by Professor Mandell Glicksberg at the University of Florida College of Law from which she graduated in 1985. It was Professor Glicksberg who suggested that she might seek employment with The Fund.

Since joining The Fund in 1988, Ms. Clark has held various positions including Claims Vice President and Risk Manager. She considers herself a utility player on the team having worked in all departments within The Fund's Legal Division.

Back to Speaker Topics

Quiz on
Recent Florida Real Property Cases

by Connie Clark

Instructions: For each statement, please circle "T" if you believe that the statement is "True" or circle "F" if you believe that the statement is "False". Please keep a running total of the number of questions you have answered correctly.

---

1. T or F A property owner who does not own any submerged land associated with the property was rightfully denied a dock permit.

Whetstone v. City of St. Augustine
2016 WL 542870
(Fla. 5th DCA 2016)

2. T or F For purposes of the statute of limitations in a construction dispute, the contract is complete when both parties have completed the contract.

Cypress Fairway Condominium v. Bergeron Construction Co., Inc.
164 So. 3d 706
(Fla. 5th DCA 2015)

3. T or F Specific performance is a viable remedy to enforce a contract for the sale of homestead property.

Mirzataheri v. FM East Developers, LLC
2016 WL 1039124
(Fla. 3d DCA 2015)

4. T or F A seller who visits a vacant building site while it is being cleared and filled may not have actual knowledge of the subsurface conditions of the property.

Eiman v. Sullivan
173 So.3d 994
(Fla. 2d DCA 2015)

5. T or F A government imposed restrictive covenant relating to land use approval may be extinguished by the Marketable Record title Act.

Save Calusa Trust v. St. Andrews Holdings, Ltd.
2016 WL 145997
(Fla. 3d DCA 2016)

6. T or F The doctrine of impossibility of performance may trump a deed restriction which requires the installation of a traffic control gate.

Marathon Sunsets, Inc. v. Coldiron
2016 WL 1047778
(Fla. 3d DCA 2016)

7. T or F The claims of known or reasonably ascertainable estate creditors who were not served with a notice to creditors are timely if filed within two years of the death of the decedent.

Jones v. Golden
176 So.3d 242
(Fla. 2016)

8. T or F The conveyance of a one-third interest to a single man and a two-thirds interest to a married couple with full rights of survivorship does not create a joint tenancy with rights of survivorship because there is not a unity of interests.

Simon v. Koplin
159 So.2d 281
(Fla. 2d DCA 2015)

9. T or F A trust that has no remainder beneficiaries designated in the trust may not be reformed upon the death of the lifetime beneficiary.

Megiel-Rollo v. Megiel
162 So.2d 1088
(Fla. 2d DCA 2015)

10. T or F Section 689.07, F.S. must be read as a whole to determine whether a grantee who takes title as trustee, without any further reference to a trust or beneficiaries, holds title in fee simple or as trustee.

Heiskell v. Morris
2015 Fla. L. Weekly D2809b
(Fla. 1st DCA 2015)

11. T or F A Chapter 7 debtor may not strip off a junior mortgage on the debtor's property when the amount of the senior mortgage exceeds the property's current value.

Bank of America v. Caulkett
135 S. Ct. 1995
(2015)

12. T or F A junior lien holder may foreclose a senior mortgage as long as the senior mortgagee was properly joined in the junior lien holder's foreclosure action.

Bank of America v. Kipps Colony II Condominium Association, Inc.
40 Fla. L. Weekly D2736a
(Fla. 2d DCA 2015)

13. T or F A non-owner spouse who joins on a reverse mortgage encumbering homestead property is not a borrower as described in the mortgage.

Smith v. Reverse Mortgage Solutions, Inc.
2015 WL 4257632
(Fla. 3d DCA 2015)

Edwards v. Reverse Mortgage Solutions, Inc.
2016 WL 822084
(Fla. 3d DCA 2016)

14. T or F The doctrine of after-acquired title may benefit a subsequent purchaser.

BCMI Holdings, LLC v. Wilmington Trust, N.A.
40 Fla. L. Weekly D2193a
(Fla. 3d DCA 2014)

15. T or F A county land development code which does not specifically define the phrase "non-residential uses" is unconstitutionally ambiguous.

Bennett v. Walton County
40 Fla. L. Weekly D1452a
(Fla. 1st DCA 2015)

16. T or F An easement in gross does not require the existence of a servient estate.

Dunes of Seagrove Owners Association, Inc. v. Dunes of Seagrove Development, Inc
40 Fla. L. Weekly D2755a
(Fla. 1st DCA 2015)

17. T or F The intention of the parties to an ambiguous easement may be taken into consideration to determine the scope of the easement.

Buie v. Bluebird Landing Owner's Association, Inc.
172 So.3d 519
(Fla. 1st DCA 2015)

18. T or F A tenant under a lease without an express pass-through provision is not liable for ad valorem taxes that are the responsibility of the lessor.

Grove Key Marina, LLC v. Fernando Casamayor
166 So.3d 879
(Fla. 3d DCA 2015)

19. T or F A family unit is not entitled to multiple homestead tax exemptions under the Florida Constitution.

Endsley v. Broward County
41 Fla. L. Weekly D738a
(Fla. 4th DCA 2016)

20. T or F Adverse possession does not always require a written instrument which describes the disputed property to establish color of title.

Dadd v. Houde
176 So.3d 347
(Fla. 3d DCA 2015)

RECENT FLORIDA REAL PROPERTY CASES

(January 2015 through March 2016)

by
Connie Clark
Senior Underwriting Counsel
Attorneys' Title Fund Services, LLC
James R. Usery, Esq.
G. Robert Arnold, Esq.

I. CLOSING AGENTS & TITLE INSURANCE

A. Statute of limitations for title claim and malpractice action. An owner of real property may be barred by the appropriate statute of limitations for an untimely claim against its title insurance underwriter and attorney. *West Brook Isles Partners 1, LLC v. Commonwealth Land Title*, 163 So.3d 635 (Fla. 2d DCA 2015).

B. CPL rights can be separated from ownership of mortgage. The right to make certain claims under a CPL can be retained when the CPL, title policy, and related loan are sold. *FDIC v. First American Title Insurance Company*, 611_ Fed.Appx. _522 (11th Cir. April 28, 2015).

II. CONDOS & CO-OPS

A. Mandatory injunction for moisture intrusion. Condominium unit owners satisfied requirements for a mandatory injunction against the association for the failure of the association to maintain and repair the slab on which their unit sits. *Amelio v. Marilyn Pines Unit II Condominium Association, Inc.* 173 So.3d 1037 (Fla. 2d DCA 2015).

B. Condominium lien priority. The trial court abused its discretion by not allowing a first mortgage lender relief from a judgment obtained by condominium association in its condominium assessment lien foreclosure action. The final summary judgment of foreclosure found the association's interest superior to that of the lender. *Bank of America v. Kipps Colony II Condominium Association, Inc.*, 40 Fla. L. Weekly D2736a (Fla. 2d DCA 2015).

III. EASEMENTS

A. Easement ambiguous as to right of use. An easement reserved by a developer over lakefront common area is ambiguous and its interpretation is not appropriate for a ruling on summary judgment. *H.A. Buie, Jr. v. Bluebird Landings Owner's Association, Inc.*, 172 So.3d 519 (Fla. 1st DCA 2015).

B. Easement in gross properly created. An easement in gross was properly created that allowed a vendor to provide beach services and assign its rights to a third party. *Dunes of Seagrove Owners Association, Inc. v. Dunes of Seagrove Development, Inc.* 180 So.3d 1209 (Fla. 1st DCA 2015).

IV. HOMESTEAD

A. Widow entitled to husband's homestead exemption. Homestead exemption of one spouse inures to the benefit of the other spouse even after the death of the spouse receiving the exemption. *Kelly v. Spain*, 160 So.3d 78 (Fla. 4th DCA 2015).

B. Some business use of homestead allowed. Use of a portion of a residence for both business and personal use does not defeat a claim property is exempt homestead. The Florida Constitution does not limit what the owner or his family can do within the four walls of their residence. In re: *Del Callejo and Marquez*, 2015 WL 779002, Case No. 14-25597 BKC AJC (S.D. Fla. 2015).

C. Cannot foreclose reverse mortgage when property is occupied by wife of deceased borrower. Reverse mortgage cannot be foreclosed while the home is still occupied by the wife of the deceased borrower. *Smith v. Reverse Mortgage Solutions, Inc.*, 40 Fla. L. Weekly D1624 (Fla. 3d DCA 2015).

D. Trial court must hear homestead arguments to stay execution of judgment. The trial court erred when it refused to hear the homeowner's arguments that their homestead property was protected from the forced sale. *Hayes v. Norman Harris Services, Inc.*, 41 Fla. L. Weekly D293 (Fla. 2d DCA 2016).

V. LEASES & LANDLORD/TENANT

A. Taxation of leasehold property. Because a lease did not contain an express "pass-through" provision, the lessees were not contractually obligated to a municipality for payment of the taxes, nor could the county pursue remedies against the lessees. *Grove Key Marina, LLC v. Fernando Casamayor*, 166 So.3d 879 (Fla. 3d DCA 2015).

VI. LIENS

A. Federal restitution lien treated same as federal tax lien. A federal restitution lien attaches in the same manner and takes its priority in the same manner as a federal tax lien. *USA v. De Cespedes and Lazaro*, 603 Fed.Appx. 769 (11th Cir. 2015).

B. U.S. Supreme Court rules against lien stripping for unsecured second mortgage. In a Chapter 7 bankruptcy, the debtor may not avoid a lien held by a junior mortgagee under Sec. 506(d) of the Bankruptcy Code if the first mortgage debt on the property exceeds the current value of the property. *Bank of America, N.A. v. Caulkett*, 575 U.S. ____ (2015).

C. Bankruptcy plan must be explicit to effectively strip lien. In order to effectively strip a lien, a bankruptcy plan must clearly state its intended effect and the creditor must have adequate notice its rights will be affected. *Nomellini v. United States of America Internal Revenue Service. (In re Nomellini),* 534 B.R. 166 (Bankr. N.D. Cal. June 25, 2015).

D. Collateral attack on Chapter 13 plan by creditor who received notice and did not object to confirmation. Creditor who received notice and did not object to confirmation can collaterally attack confirmed plan for lack of subject matter jurisdiction. *Bartlett v. Fifth Third Bank (In re Bartlett),* 619 Fed.Appx. 525 (7th Cir. July 15, 2015).

E. Common law claims precluded by construction lien statute. Contractor elected not to bring a claim under the construction lien statute and its common law claims for equitable lien and unjust enrichment were barred because of the legislative intent to replace the common law remedies with statutory relief. *Jax Utilities Management, Inc. v. Hancock Bank*, 164 So.3d 1266 (Fla. 1st DCA 2015).

VII. MISCELLANEOUS

A. Specific reference to restriction not MRTA "general reference". The Marketable Record Title Act does not extinguish homeowner's association restrictions when the deed specifically mentions the restrictions. *Barney v. Silver Lakes Acres Property*, 159 So.3d 181 (Fla. 5th DCA 2015).

B. Right of way and possession exceptions to MRTA. Property owner quieted title to property owned in fee by FDOT because exception to MRTA does not apply. *Department of Transportation v. Mid-Peninsula Realty Investment Group, LLC*, 162 So.3d 218 (Fla. 2d DCA 2015).

C. Forfeiture of home. Civil forfeiture under Florida Contraband Forfeiture Act of home worth $238,000 to $295,000, for crime that carries maximum fine of $11,000, violates Excessive Fines Clause of the Eighth Amendment. *Agresta v. City of Maitland*, 159 So.3d 876 (Fla. 5th DCA 2015).

D. Unities not required for right of survivorship. The nature of the tenancy held does not matter when there is an express survivorship provision in the deed. *Simon v. Koplin*, 159 So.3d 281 (Fla. 2d DCA 2015).

E. Right of way and possession exceptions to MRTA. Right of way means land in which the government owns the fee or has an easement devoted to or required for use as a transportation facility so exception to MRTA does apply to property owned in fee by FDOT. Additionally, the use of any portion of the property as a right of way preserves the exception for the entirety of the property. *Florida Department of Transportation v. Clipper Bay Investments, LLC*, 160 So.3d 858 (Fla. 2015).

F. Reformation of a trust. A trust may be subject to reformation to add a schedule of beneficiaries if the successor trustee can prove her claim for reformation before the trial court. *Megiel-Rollo v. Megiel*, 162 So.3d 1088 (Fla. 2d DCA 2015).

G. Same sex divorce. A same sex couple who were legally married in another state may proceed with their divorce in Florida notwithstanding Florida's Defense of Marriage Act. *Brandon-Thomas v. Brandon-Thomas*, 163 So.3d 644 (Fla. 2d DCA 2015).

H. Land development code prohibition of property use for non-residential purposes upheld. A property owner's due process rights were not violated by a county which cited the owners for non-residential use of their property in violation of a county land development code. *Bennett v. Walton County*, 174 So.3d 386 (Fla. 1st DCA 2015).

I. Settlement agreement is separate contract from parties' underlying agreements. A settlement agreement is a compromise of disputed claims and payments made under it are not payments made under the original contract between the parties. *George Ekins v. Harbourside Funding, LP*, 608 Fed.Appx. 803 (11th Cir. 2015).

J. Statute of repose commences on contract completion not construction completion. Completion of a contract means completion of performance by both sides, so date of final payment, rather than construction completion date, is relevant date for determining statute of repose for construction defect claims. *Cypress Fairway Condominium Association, Inc. v. Bergeron Construction Co., Inc.*, 164 So.3d 109 (Fla. 5th DCA 2015).

K. Failure to disclose under *Johnson v. Davis.* Failure to prove existence of material fact that affects value of property or that defendants had actual knowledge of that fact forecloses *Johnson v. Davis* non-disclosure claim. *Eiman v. Sullivan*, 173 So.3d 994 (Fla. 2d DCA 2015).

L. Jurisdiction after entry of final foreclosure judgment. Trial court has jurisdiction after entry of final judgment to determine if relief from that judgment should be granted by virtue of satisfaction, release, or discharge of the underlying claim. *Horizon Construction Management Services, Inc. v. Memphis Investments, Inc.*, 163 So.3d 1264 (Fla. 2d DCA 2015).

M. Statute of Frauds. Relevant inquiry for application of statute of frauds is not whether parties intended oral contract to last longer than one year, or whether the contract did last longer than one year, but whether the contract could possibly have been performed within one year. *Browning v. Poirier*, 165 So.3d 663 (Fla. 2015).

N. Will provision affecting spouse is void upon divorce. Will provision creating trust for relatives of wife is void after divorce. *Helen Carroll v. Stuart G. Israelson, as Personal Representative*, 169 So.3d 239 (Fla. 4th DCA 2015).

O. Wife not entitled to interest in home owned by husband prior to marriage. A spouse is not entitled to an interest in the marital home that was owned by the other spouse prior to the marriage, if there was no enhancement in the value of the home during the marriage. *Weaver v Weaver*, 174 So.3d 482 (Fla. 4th DCA 2015).

P. Complaint fails to state a cause of action. When a complaint fails to state a cause of action, the resulting judgment is voidable, rather than void, and the one year limitation under Fla. R. Civ. P. 1.540(b) on an attack on its validity is applicable. *The Bank of New York Mellon v. Condo. Ass'n of La Mer Estates, Inc.*, 175 So.3d 282 (Fla. 4th DCA 2015).

Q. Adverse Possession. A suit for adverse possession without payment of taxes does not require "paper title" under 1974 version of statute. *Dadd v. Houde*, 176 So.3d 347 (Fla. 3d DCA 2015).

R. Wife has right to full participation in hearing for incapacity and guardianship of husband. A wife has a due process right to full participation in hearings to determine incapacity and to appoint a guardian for her husband. *Zelman v. Zelman*, 175 So.3d 871 (Fla. 4th DCA 2015).

S. Trustee takes title without reference to trust. The provisions of Sec. 689.07, F.S. must be read as a whole to determine whether a grantee who takes title as trustee without any further reference to a trust or beneficiaries holds title in fee simple or as trustee. *Heiskell v. Morris*, 40 Fla. L. Weekly D2809 (Fla. 1st DCA 2015).

T. Statute of limitations for known or reasonably ascertainable estate creditors. The claims of known or reasonably ascertainable creditors who were not served with a copy of the notice to creditors are timely if filed with two years of the death of the decedent. *Jones v. Golden*, 176 So.3d 242 (Fla. 2015).

U. All property of debtor subject to federal forfeiture. The supremacy clause of the United States Constitution allows federal liens to trump state exemptions for liens such as federal criminal judgment for restitution. *U.S. v. Wright*, 621 Fed.Appx. 617 (Mem), (11th Cir. 2015).

V. Free and clear sale from bankruptcy estate. A bankruptcy debtor or trustee can sell real property free and clear of the interests of a non-debtor co-owner upon showing four statutory conditions are met. *In re: Navarro,* 2016 WL 93806 (Bankr. S.D. Fla. 2016).

VIII. MORTGAGES & MORTGAGE FORECLOSURES

A. TIL rescission. A borrower exercising his right to rescind under the Truth in Lending Act need only provide written notice to his lender within the three-year period, not file a suit within that period. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S.Ct. 790 (2015).

B. Equal Credit Opportunity Act. A lender does not violate 15 U.S.C., Sec. 1691(a)(1) of the Equal Credit Opportunity Act of 1974 (lenders may not discriminate on the basis of gender or marital status of a credit applicant) by requiring a spouse to sign loan instruments when a substantial amount of the assets pledged as security are owned by both spouses. *Richardson v. Everbank*, 152 So.3d 1282 (Fla. 4th DCA 2015).

C. Correcting a foreclosure judgment. Florida Rule of Civil Procedure 1.540(a) which allows for correction of clerical mistakes in a final judgment does not allow substitutive change to the judgment. *Lorant v. Whitney National Bank*, 162 So.3d 244 (Fla. 1st DCA 2015).

D. Foreclosure sale notice. A foreclosure sale may not be set aside without proper notice to the third party purchaser at the sale. *Skelton v. Lyons*, 157 So.3d 471 (Fla. 2d DCA 2015).

E. Short sale purchaser entitled to intervene in pending foreclosure. Although a purchaser during a pending foreclosure action purchases at his own risk and generally is not entitled to intervene, the same is not the case when the lender is actively involved in the purchase transaction and the purchaser reasonably believes the lender will clear the title to the property following the short sale. *Bymel v. Bank of America***,** 159 So.3d 345 (Fla. 3d DCA 2015).

F. Undated endorsement of note ineffective to establish standing. When a plaintiff relies on an undated endorsement of a note, it must show the endorsement occurred prior to the filing of the complaint. *Lloyd v. The Bank of New York Mellon, as Trustee*, 157 So.3d 471 (Fla. 4th DCA 2015).

G. Robo-witness fails to establish lenders standing to foreclose. The substituted plaintiff in a mortgage foreclosure action could not prove that it was the holder of the promissory note entitling it foreclose the mortgage secured by the note. *Creadon v. U.S. Bank, N.A.*, 166 So.3d 952 (Fla. 1st DCA 2015).

H. Extending a lis pendens. A lis pendens serves to warn third parties and to protect the plaintiff. Good cause must be shown to extend a lis pendens to additional property. *J.B.J. Investment of South Florida, Inc. v. Timothy W. Maslanka,* 163 So.3d 726 (Fla. 5th DCA 2015).

I. Determining priority between competing notes. UCC, rather than recording statute, governs competing claims between successive assignees of a mortgage. *HSBC Bank, N.A. v. Rolando Perez,* 165 So.3d 696 (Fla. 4th DCA 2015).

J. Acceleration in dismissed foreclosure does not bar later foreclosure. Acceleration of a mortgage in a dismissed foreclosure proceedings does not bar a later foreclosure action on a separate default. *David Stern, Personal Representative of the Khaki Realty Trust v. Bank of America Corp.*, 112 F.Supp.3d 1297, (M.D. Fla. 2015).

K. Parent corporation cannot exercise rights of wholly owned subsidiary. A parent corporation does not have the right to enforce a note and mortgage owned by its wholly owned subsidiary. *Wright v. JPMorgan Chase Bank, N.A.*, 169 So.3d 250 (Fla. 4th DCA 2015).

L. Lender cannot foreclose reverse mortgage when property is occupied by wife of deceased borrower. Reverse mortgage cannot be foreclosed while the home is still occupied by the wife of the deceased borrower. *Smith v. Reverse Mortgage Solutions, Inc.*, 40 Fla. L. Weekly D1624 (Fla. 3rd DCA 2015) and *Edwards v. Reverse Mortgage Solutions, Inc.*, 2016 WL 822084 (Fla. 3d DCA 2016).

M. Lender not obligated to release mortgage if short sale approval conditions not met. Lender not obligated to provide release if all conditions of its short sale approval letter are not met. *Reza Jafari and First American Title Insurance Company, Inc. v. FDIC, as Receiver*, 2015 WL 3604443 (S.D. Cal. 2015).

N. Affidavit in opposition to summary judgment creates issue of fact. An affidavit in opposition to a summary judgment motion in a foreclosure action contained facts sufficient to preclude the entry of the motion based on ambiguity in the mortgage as to what property was encumbered. *Fowler v. TD Bank, N.A.*, 172 So.3d 569 (Fla. 5th DCA 2015).

O. Junior lien holders entitled to a trial on the merits. Lien holder defendants, whose interests are inferior to a mortgage, are entitled to a trial on the merits of the case in a foreclosure notwithstanding a settlement agreement between the lender and the borrower. *Tanner Andrews, P.A. v Bayview Loan Funding, LLC.*, 175 So.3d 316 (Fla. 5th DCA 2015).

P. Failure to join owner results in void foreclosure judgment. The fee simple title holder is an indispensable party to a foreclosure action and a judgment obtained without the joinder of the owner is void. *Citibank, N.A. v. Villanueva*, 174 So.3d 612 (Fla. 4th DCA 2015).

Q. Doctrine of after-acquired title validates PMM. The doctrine of after-acquired title can operate to validate a purchase money mortgage. *BCML Holding LLC v. Wilmington Trust, N.A.*, 40 Fla. L. Weekly D2193 (Fla. 3d DCA 2015).

R. Standing to bring foreclosure action. Because there was a missing link in the transfer of the rights under the note to the foreclosing lender, the court found that the lender had failed to prove standing *Murray v. HSBC Bank USA*, 157 So.3d 355 (Fla. 4th DCA 2015).

S. Dissolution of marriage and the marital home. The court ruled that the husband be directed to attempt to refinance the home to get a mortgage solely in his name within a reasonable period of time. *Patel v. Patel*, 162 So.3d 165 (Fla. 5th DCA 2015).

T. Statutes of repose and limitation. Because the maturity date of the loan agreement could not be ascertained from the recorded mortgage, the 20 year statue of repose of Sec. 95.281(1)(b), F.S. applies. *CCM Pathfinder Palm Harbor Management LLC v. Gendron*, 150 So.3d 1143 (Fla. 2d DCA 2015).

U. Surplus proceeds from a foreclosure sale. A claim to surplus funds from a foreclosure sale is timely if filled within 60 days after the filing of the certificate of title. *Straub v. Wells Fargo Bank, N.A.*, 40 Fla. L. Weekly D2470 (Fla. 4th DCA 2016).

V. Right of redemption in foreclosure. Exercise of the right of redemption is a matter of right and is effective even if there was no record notice of its exercise and the foreclosure sale was erroneously not cancelled. *Popescu v. Laguna Master Association, Inc.*, 184 So.3d 1196 (Fla. 4th DCA 2016).

W. Lis pendens bars separate action. After a notice of lis pendens has been filed in a foreclosure action, a junior lienholder cannot file a separate action to foreclose its lien because exclusive jurisdiction to foreclose on the property is in the court conducting the foreclosure of the senior lien. *Jallali v. Knightsbridge Village Homeowners Ass'n*, Case No. 4D15-2036, 2016 WL 320601 (Fla. 4th DCA 2016).

X. Owner versus holder of promissory note. The holder of a promissory note is not the same as an owner of the note for purposes of standing in a mortgage foreclosure action. *Angelini v. HSBC Bank USA, N.A., as Trustee*, 41 Fla. L. Weekly D370 (Fla. 4th DCA 2016).

Y. Rule 1.540(b)(4) not applicable to orders. Rule 1.540(b)(4) of the Florida Rules of Civil Procedure applies to judgments and decrees of the court, but not to orders. *De La Osa v. Wells Fargo Bank, N.A.*, 2016 WL 517466 (Fla. 3d DCA 2016).

Z. Reformation of mortgage after certificate of title. The reformation of a mortgage after the issuance of the certificate of title does not require dismissal of the original action, but rather the vacation of the final judgment, judicial sale and issuance of the certificate of title. *Federal National Mortgage Association v. Sanchez*, 41 Fla. L. Weekly D594 (Fla. 4th DCA 2016).

IX. RESTRICTIONS & HOA

A. MRTA and government imposed restrictions. The Marketable Record Title Act cannot eliminate a recorded restrictive covenant imposed as a condition of the zoning approval process. *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 41 Fla. L. Weekly D171 (Fla. 3d DCA 2016).

B. Suit to invalidate restrictive covenants barred by statute of limitations. A suit by homeowners to void two amendments to their subdivision's restrictive covenants was

barred by the five year statute of limitations of Sec. 95.11(2)(b), F.S., *Hilton v. Pearson*, 2016 WL 517105 (Fla. 1st DCA 2016).

C. Residential Restrictive Covenant-No Neighbor Veto. A restrictive covenant that stated that lighting systems that may be offensive to adjacent neighbors are unacceptable. The court determined that no "neighbor veto" existed. *Leamer v. White*, 156 So. 3d 567 (Fla. 1st DCA 2015).

D. Impossibility of performance prevents compliance with deed restrictions. The court applied the doctrine of impossibility of performance to find that a property owner was not required to build a gate as required by deed restriction when the permit was denied. *Marathon Sunsets, Inc. v. Coldiron*, 2016 WL 1047778 (Fla. 3d DCA 2016).

X. STATE TAXATION

A**. Widow entitled to husband's homestead exemption.** Homestead exemption of one spouse inures to the benefit of the other spouse even after the death of the spouse receiving the exemption. *Kelly v. Spain*, 160 So.3d 78 (Fla. 4th DCA 2015).

B. Equitable ownership determines immunity from taxation. When the U.S. Navy retains equitable ownership, and has not consented to taxation, property is immune from taxation even though legal title is held by a for-profit company. *Russell v. Southeast Housing, LLC*, 162 So.3d 262 (Fla. 3d DCA 2015).

C. Enforceability of a PILOT agreement. An agreement entered into with a municipality that requires payments in lieu of taxes is contrary to Florida law. *AHF-Bay Fund, LLC v. City of Largo*, 169 So.3d 133 (Fla. 2d DCA 2015).

D. Ad valorem taxation of public property under private use. Municipality is responsible for ad valorem taxes on property leased to a private entity, while the private entity is responsible for taxes on the intangible leasehold interest, and in the absence of an express contractual "pass-through" provision in the lease, the lessee is not obligated to the municipality for payment of the ad valorem taxes. *Grove Key Marina, LLC. v. Casamayor v. The City of Miami*, 166 So.3d 879 (Fla. 3d DCA 2015).

E. Debtor can avoid tax foreclosure. *In rem* tax foreclosure of home provided less than reasonably equivalent value and could be avoided in bankruptcy. *Clay v. City of Milwaukee (In re Clay)*, 2015 WL 3878454 (Bankr. E.D. Wis. 2015).

F. Tax deed notice requires additional reasonable steps to notify owner. The summary judgment in a quiet title action based on a tax deed was reversed and remanded to the trial court to determine if additional reasonable steps were taken to provide notice of the sale after a notice by certified mail was returned. *Thompson v. Markham*, 164 So.3d 1289 (Fla. 1st DCA 2015).

XI. VENDORS & PURCHASERS

A. Silence on terms sufficient for exercise of right of first refusal. An announcement of a desire to exercise a right of first refusal implicitly adopts the terms of the third party contract. *Castelli v. Castelli*, 159 So.3d 271 (Fla. 4th DCA 2015).

B. Fraudulent transfer of LLC assets. In absence of an operating agreement, disposition of a removed member's interest either may be treated as if the member withdrew, which would entitle him to receive the fair value of his interest, or the removal of the member may be accompanied by dissolution of the LLC. *Froonjian v. Ultimate Combat, LLC*, 169 So.3d 151 (Fla. 4th DCA 2015).

C. Florida real estate recovery fund tapped for broker fraud. In an administrative appeal from the Florida Department of Business and Professional Regulation, several purchasers were allowed to recover deposits from the real estate recovery fund for broker fraud. *Hendricks v. Department of Business and Professional Regulation*, 183 So.3d 1172 (Fla. 5th DCA 2016).

XII. WATER & WATERCOURSES

A. Non-waterfront property does not include submerged land or riparian rights. Property owner's dock permit application was rejected on the basis that the property did not include submerged lands or riparian rights. *Whetstone v. City of St. Augustine*, 2016 WL 542870 (Fla. 5th DCA 2016).

XIII. ZONING & LAND USE

A. Land development code prohibition upheld. A property owner's due process rights were not violated by a county which cited the owners for non residential use of their property in violation of a county land development code. *Bennett v. Walton County*, 174 So.3rd 386 (Fla. 1st DCA 2015).

B. MRTA and government imposed zoning restrictions. The Marketable Record Title Act cannot eliminate a recorded restrictive covenant imposed as a condition of the zoning approval process. *Save Calusa Trust, et al. v. St. Andrews Holdings, Ltd.*, 41 Fla. L. Weekly D171 (Fla. 3d DCA 2016).

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FUND ASSEMBLY 2016

CIVILITY AND PROFESSIONALISM PANEL

Michael Rothman, Partner at Rothman & Tobin, P.A.
Robert Cole, Shareholder with Upchurch Watson White & Max Mediation Group
Harold "Hal" Downing, Downing Law Offices
Sr. Judge Emerson Thompson, Senior Judge Ninth Judicial Circuit, Fifth District Court of Appeals & Immediate Past President of The Florida Bar Foundation

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SPEAKER INFORMATION

CIVILITY AND PROFESSIONALISM PANEL

Michael Rothman

Partner at Rothman & Tobin, P.A.

Michael Rothman is a partner at Rothman & Tobin, P.A. in Miami. He has nearly 30 years of experience in litigating real estate cases in State and Federal Court and has long represented The Fund as an outside claims counsel, helping resolve title insurance claims for its owners and lenders. Mr. Rothman also handles residential and commercial closings, and has represented some of Florida's premier homebuilders in many south and central Florida communities, including Weston, Baldwin Park, Lake Nona and Celebration.

He is regularly retained as an expert witness in real estate cases and also practices as a certified circuit court mediator. Mr. Rothman is a frequent lecturer for National Business Institute, speaking on topics ranging from claims avoidance to ethical considerations for the real estate practitioner. He is a graduate of SUNY-Albany and the University of Miami School of Law.

Robert Cole

Shareholder with Upchurch Watson White & Max Mediation Group

Robert A. Cole is a shareholder with Upchurch Watson White & Max Mediation Group and a full-time mediator. While in private practice, his areas of practice included commercial litigation, construction law, mass tort, personal injury and wrongful death, and professional malpractice. Mr. Cole was invited to become a member of the American Board of Trial Advocates (ABOTA) in 1990. He was selected as FLABOTA Trial Lawyer of the Year in 2008. Mr. Cole is past president of the Jacksonville Chapter of ABOTA and past president of FLABOTA.

Mr. Cole currently serves as chair of the Jacksonville Bar Association's ADR Committee and is a member of the Executive Council of The Florida Bar ADR Section. He is admitted to practice in Florida and before the U.S. Supreme Court; the U.S. District Court for the Middle and Northern districts of Florida; and the U.S. Court of Appeals, 5th and 11th circuits. Mr. Cole received his B.A. degree from Florida State University and his J.D. degree from Florida State University College of Law.

Harold "Hal" Downing

Downing Law Offices

Harold “Hal” Downing has been practicing law for more than 34 years, the last two of which have been solo with Downing Law Offices, P.A. in Winter Park, FL. Until the Great Recession, his practice primarily involved residential development for Arvida and builders like Centex Homes. Mr. Downing received his B.S.B.A. degree in economics from Florida Technological University, now the University of Central Florida, and his J.D. degree from Vanderbilt University School of Law. An avid cyclist, he is a member of The Florida Bar and AV-Rated by Martindale-Hubbell.

Sr. Judge Emerson R. Thompson, Jr.

Senior Judge Ninth Judicial Circuit, Fifth District Court of Appeals & Immediate Past President of The Florida Bar Foundation

Thompson has been on the Foundation board since 1995 and previously served from 1991 to 1993. He has chaired or been active on numerous Foundation committees, including the executive, investment, Medal of Honor Award, finance and audit, legal assistance for the poor/law student assistance, and improvements in the administration of justice committees.

Prior to his retirement in 2008, Thompson served as a county, circuit and appellate judge. He was appointed to the Fifth District Court of Appeal in 1993 and served as chief judge from 2000 to 2003. Before his appointment to the appellate bench, he was a trial judge in the Ninth Judicial Circuit and was elected chief judge of the Ninth Judicial Circuit by his colleagues, serving in that capacity from 1989 to 1991. In 1994, he was one of three finalists whose name was submitted to Gov. Lawton Chiles for appointment to the Florida Supreme Court.

Thompson received his law degree from the Florida State University College of Law and his bachelor’s degree from the University of Florida. He is a founder and former president of The First Central Florida American Inns of Court. He is an active lecturer and former adjunct professor at Valencia College in Orlando and an alumnus and former faculty member of the National Judicial College.

Thompson is a Fellow of The Florida Bar Foundation and a member of its Bronze Society for lifetime giving.

CIVILITY AND PROFESSIONALISM

Presented to:

2016 FUND ASSEMBLY

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The Fund®

Code of Professionalism

As a panel member and client of The Fund, I shall

Always remember that the practice of law is first and foremost a profession.

Encourage respect for the law, the courts, and the right to trial by jury.

Always remember that my word is my bond and honor my responsibilities to serve as an officer of the court and protector of individual rights.

Contribute time and resources to public service, public education, charitable and pro bono activities in my community.

Work with the other members of the bar, including judges, opposing counsel, and those whose practices are different from mine, to make our system of justice more accessible and responsive.

Resolve matters and disputes expeditiously, without unnecessary expense, and through negotiation whenever possible.

Keep my clients well-informed and involved in making decisions affecting them.

Achieve and maintain proficiency in my practice and continue to expand my knowledge of the law.

Be respectful in my conduct toward my adversaries.

Honor the spirit and intent, as well as the requirements, of applicable rules or codes of professional conduct, and shall encourage others to do so.

THE FLORIDA BAR

The Florida Bar News

October 1, 2011

Revised admission oath now emphasizes civility

By Jan Pudlow
Senior Editor

In an adversarial system, lawyers don't always play nice. Attorneys don't always address their arguments to the court, sniping at each other instead. Polite communication devolves into snarky emails. Tempers flare at depositions. Good manners, professionalism, and civility sometimes get lost in the fray of winning a case.

So, on September 12, the Florida Supreme Court added this new language to the Oath of Admission to The Florida Bar, sworn to by every new lawyer, effective immediately:

"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."

"It's something that should have been in the oath of admission from the beginning, in my opinion," said Robert A. Cole, of Jacksonville, immediate past president of FLABOTA, the state chapter of the American Board of Trial Advocates that has been working on this issue for years, along with The Florida Bar and law schools.

"We should all treat each other with professionalism and civility. It should be understood. But I think it's just reacting to the lack of civility that is going on in our society as a whole — not just the legal profession. I think it was the right thing to do by the Supreme Court."

Acting on its own in a unanimous decision in Case No. SC11-1702, the court noted two trends: Growing concerns in recent years about incivility among attorneys, and that ABOTA, among others, have taken steps to raise the level of awareness about the importance of civility in practicing law.

For several years, Cole said, the national ABOTA has presented an educational program called "Civility Matters," to bar association groups and law schools. One of the core missions of ABOTA, made up equally of civil defense and plaintiffs' trial counsel, with nearly 7,000 members in all 50 states, is the promotion of professionalism and civility. A committee in the national organization has encouraged states to amend their oaths of admission to require civility in all dealings.

The Florida Supreme Court specifically noted that ABOTA's Code of Professionalism includes a pledge to be "respectful in my conduct toward my adversaries."

South Carolina added a civility pledge to its oath of admission in 2003. Other states, including Utah and New Mexico, have taken similar actions.

Kenneth Marvin, staff counsel of the Bar's Lawyer Regulation Department, noted there is already an existing rule — Rule 4-8.4 Misconduct — that could be used to enforce civility, even though that term is "somewhat vague."

But, Marvin said, the new language in the Oath of Admission to The Florida Bar "is not aspirational, but enforceable to all those who take the oath."

At a recent civility seminar in Tampa, co-sponsored by Tampa Bay ABOTA, the Hillsborough County Bar Association, and Stetson University College of Law, National ABOTA Vice President Mick Callahan, of St. Petersburg, said he asked Chief Justice Charles Canady, the keynote speaker, if he would consider supporting adding the civility clause to Florida's Oath of Admission.

"He said he would explore it with the court and supported the idea," Callahan said, adding he thinks it's necessary because "uncivil conduct by trial lawyers in depositions, in correspondence and phone communications, in scheduling matters, and in mediation proceedings has been increasing."

As a lawyer for 33 years, Cole said, he has "seen a decline in civility. It's been just kind of a gradual type of problem. I see it more with younger lawyers just coming out of law school who are relatively inexperienced. They haven't been properly trained or properly mentored to know courtroom decorum and generally how to treat other members of the profession with civility. It's something you have to learn. You have to be taught it and gain it by experience."

Cole said he learned how to practice law with civility from his two mentors, Rut Liles, president of The Florida Bar in 1988, and longtime Jacksonville lawyer Joe Milton.

Even though Cole was admitted to the Bar in 1978, he said he's never outgrown his mentors. He still gives them a call to ask: "What would you do? How would you handle this?"

Here's an example of uncivility by lawyers Cole has noticed:

"You are in court or in the judge's chambers arguing a disputed motion. Your argument should also be directed to the court. Your comments, your legal and factual arguments, should be made to the judge. What you see sometimes is things break down, and the two lawyers sitting across the table from each other start arguing with each other. The judge has to step in and maintain control."

He has also noticed that some young lawyers "are not being respectful or showing the right etiquette towards not only other attorneys, but the judges."

Miami lawyer Herman Russomanno, 2000 Bar president, past president of the ABOTA Miami Chapter and FLABOTA, and now serving on the ABA Commission on Ethics 20/20, quoted the late U.S. Supreme Court Chief Justice Earl Warren: "The law floats in a sea of ethics."

"One of the specific purposes of ABOTA is to elevate the standards of integrity, honor, and courtesy in the legal profession," Russomanno said.

"It is indeed a high honor for ABOTA/FLABOTA to work with the Florida Supreme Court and The Florida Bar on litigation, civility, and professionalism. For our Supreme Court to revise the Oath of Admission to include this pledge of civility speaks volumes of the excellent work of ABOTA, not only in Florida but throughout the United States."

[Revised: 12-02-2015]

News HOME

Houston Letter

Dear _____,

I am sorry that a hurricane hit Houston.

I am sorry that I had no power or water at my house as a result of the hurricane.

I am sorry that I had to extend my stay out of state because of the hurricane.

I am sorry that CenterPoint Energy did not bend more quickly to your desires and restore power to my home so that I could return to it sooner.

I am sorry that upon returning to my home on Monday, September 22, 2008, I discovered a roughly 50 ft. x 6 ft. swath of human excrement, used condoms, and all the other niceties that come with a raw sewage leak in one's backyard which drains into one of the main bayous in Houston.

I am sorry that I had to threaten the City of Houston officials with lawsuits and local news exposure in order to get them to even agree to meet with me about cleaning up the problem.

I am sorry that these city officials chose a date that interfered with our deposition and gave me no other options.

I am sorry that the Houston Public Works Department had to use a fire hose to blow human feces out of my yard on the day our deposition was scheduled.

I am sorry that the city required my presence at the debacle noted immediately above. And, I am sorry that this debacle managed to uproot some more of my trees.

I am sorry that your office communicated that you would only "agree" to my rescheduling the deposition if we agreed to pay your travel expenses. I am also sorry they did not mention anything about attorney's fees in their voicemail. I am especially sorry that your associate, after I had agreed to pay your reasonable travel expenses, decided to put in writing that while the deposition was cancelled, it was "unilaterally cancelled," and that you did not "agree" to the cancellation. I am sorry that you either went back on your word, or more likely, just do not have a word.

I am sorry that you think the judge should be involved in this matter. I wonder if the judge will be sorry about that, too.

I am sorry that you are the only lawyer in this case that consistently goes out of his way to be unaccommodating and unprofessional with the other lawyers. I am sorry you are from Dallas.

Very truly yours,

_____

§ 3(b)(3), Fla. Const., requires that the "district court decision under review 'must contain a statement or citation effectively establishing a point of law upon which the decision rests.'" *Tippens v. State*, 897 So.2d 1278, 1280 (Fla.2005) (quoting *Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988)). In *Polite*, the district court expressly held that the defendant's claim of error regarding the admission of evidence of past recollection recorded "was not properly preserved for appellate review." 41 So.3d at 939; *see* § 90.803(5), Fla. Stat. (2008) (governing admission of past recollection recorded). The Fifth District's decision rests on this holding. Accordingly, the district court's further discussion of its "belief" that had the claim been preserved, the defendant would not be entitled to relief is dicta. *See* 41 So.3d at 939. As a result, there is no conflict of decisions regarding the admissibility of evidence under section 90.803(5) providing a basis for the Court's exercise of its discretionary jurisdiction.

POLSTON, C.J., concurs.

In re CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS.

No. SC13–688.

Supreme Court of Florida.

June 6, 2013.

Original Proceedings—Code for Resolving Professionalism Complaints.

LEWIS, J.

The Supreme Court of Florida Commission on Professionalism has requested that the Court adopt a Code for Resolving Professionalism Complaints which would include a structure to provide a process to more critically address professionalism issues in Florida. We have jurisdiction, art. V, § 15, Fla. Const. ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted"), and grant the request.

The current professionalism movement in Florida traces its formal beginning to a Florida Bar task force created in 1989 which generated a report to this Court in 1996 that reported lawyers' professionalism to be in a state of "steep decline." In July of 1996, The Florida Bar requested that this Court create the Supreme Court of Florida Commission on Professionalism with the overarching objective of increasing the professionalism aspirations of all lawyers in Florida and ensuring that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well.

Recognizing that professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances, Florida has traditionally followed a more passive, academic approach to enhance and improve professionalism. Continuing legal education programs, speeches, contests, meetings and other academic methods of addressing professionalism have been implemented on both state and local levels. During the last two years, the Professionalism Commission has studied and reviewed both our status and progress in advancing professionalism. Although it is impossible to determine with scientific cer-

tainty the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by preventing a further decline as reported in 1996, the Professionalism Commission has concluded that we continue to experience significant problems that are unacceptable, requiring further and more concrete action. Surveys of both lawyers and judges continue to consistently reflect that professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today. While we continue our educational approach, the Professionalism Commission concluded that further integrated, affirmative, practical and active measures are now needed. We agree.

Over the years, we have come to understand that professionalism or acceptable professional behavior is not simply a matter of character or principles nor is it simply an issue of rule-following or rule-violating. To the contrary, unacceptable professional conduct and behavior is often a matter of choice or decision-making. Therefore, we accept the proposal of the Professionalism Commission to create a structure for affirmatively addressing unacceptable professional conduct. This first step admittedly contains small initial measures designed to firmly encourage better behavior. This structure attempts to utilize a wide range of interventions from mere conversations to written communications to more severe sanctions as may be applied under our existing Florida Code of Professional Responsibility, which continues above and beyond the structure we approve today.

As a first step, the Professionalism Commission has concluded and now proposes that we should *not* attempt to create an entirely new code of "professional" or "unprofessional" conduct nor should we, at this time, attempt to codify an entirely new "Code of Professionalism." We agree with this approach. The Professionalism Commission has proposed, and we adopt, the collection and integration of our current and already existing standards of behavior as already codified in: (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court into and as part of the Code for Resolving Professionalism Complaints we adopt today. This provides an integrated standard based on the standards previously adopted and already in existence for many years. These standards have been previously approved and are in use, but are not expressed and placed in one location as our standards of expected professional behavior.

The Professionalism Commission has also proposed that the mechanism for initiating, processing, and resolving professionalism complaints be the Attorney Consumer Assistance and Intake Program (ACAP) created by The Florida Bar. We agree and adopt this mechanism. ACAP has been previously created and already accepts, screens, mediates and attempts to resolve any complaints concerning professional behavior. This structure exists to receive and resolve any complaints before and in the place of the initiation of formal grievance proceedings.

The Professionalism Commission also recognized that pursuant to the Administrative Order issued by this Court on June 11, 1998, the Chief Judge of each circuit was directed to create and maintain in continuous operation a Circuit Committee on Professionalism. The Professionalism Commission has proposed that a local committee in each circuit be activated to receive, screen and act upon any and all

complaints of unprofessional conduct and to resolve those complaints informally, if possible, or refer to The Florida Bar if necessary. We agree with this proposal and also adopt the Local Professionalism Panel plan. The Chief Judge of every circuit shall create a Local Professionalism Panel to receive and resolve professionalism complaints informally if possible. In the discretion of the Chief Judge, the Circuit Committee on Professionalism may be designated as the Local Professionalism Panel. The Chief Judge of each circuit is responsible for activating the respective committees.

The Code for Resolving Professionalism Complaints, attached as Exhibit A, was published for comments, comments were received and considered by the Professionalism Commission, and a public hearing was conducted. The Conference of County Court Judges and the Conference of Circuit Court Judges have responded in favor of the proposed Code as an initial step toward improving professional conduct in Florida. We hereby adopt the Code for Resolving Professionalism Complaints attached as Exhibit A, effective immediately. The Court extends its gratitude to the members of the Professionalism Commission, the Standing Committee on Professionalism, The Florida Bar Center for Professionalism, and The Florida Bar for the extensive work expended in connection with this major project.

It is so ordered.

POLSTON, C.J., and PARIENTE, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

EXHIBIT A

Code for Resolving Professionalism Complaints

Standards of Professionalism

Members of The Florida Bar shall not engage in unprofessional conduct. "Unprofessional conduct" means substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*

EXHIBIT A—Continued

Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the *Rules of Professional Conduct.* In particular, Rule 4–8.4(d) of *The Rules Regulating The Florida Bar* has been the basis for imposing discipline in such instances. *See generally, The Florida Bar v. Ratiner,* 46 So.3d 35 (Fla.2010); *The Florida Bar v. Abramson,* 3 So.3d 964 (Fla.2009); and *The Florida Bar v. Martocci,* 791 So.2d 1074 (Fla.2001).

Implementation Procedures

1. Terminology

1.1. **Standards of Professionalism:** The Standards of Professionalism are set forth in the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar* and the decisions of The Florida Supreme Court.

1.2. **Complainant:** The person who complains that an attorney's conduct has violated the Standards of Professionalism.

1.3. **Respondent:** The attorney whose behavior is the subject of the complaint.

1.4. **Attorney Consumer Assistance and Intake Program (ACAP):** The program of The Florida Bar which fields and screens complaints against members of The Florida Bar. Depending upon the nature and severity of the professionalism complaint, ACAP can resolve the complaint informally as provided herein or it

EXHIBIT A—Continued

can refer the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further action.

1.5. **Local Professionalism Panel:** An entity independent of The Florida Bar which is established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by attorneys practicing in that circuit.

1.6. **Practice and Professionalism Enhancement Programs:** The various programs of The Florida Bar which exist for use in diversion cases or as a condition of discipline. These programs include Ethics School, Professionalism Workshops, Law Office Management Assistance Service (LOMAS), Stress Management Workshop, Florida Lawyers Assistance, Inc., and the Trust Accounting Workshop.

2. Initiating Professionalism Complaints

2.1. **Commencement of the Process:** Any person may initiate a professionalism complaint against a member of The Florida Bar through a Local Professionalism Panel when available and appropriate, or through ACAP. Complaints received by a Local Professionalism Panel may be referred to ACAP at any time depending upon the nature and severity of the complaint.

3. Processing Professionalism Complaints Through ACAP

3.1. Complaints initiated through ACAP can be an informal request for assistance either through a telephone call or by a written request. The complaint can also be a formal complaint either under oath as required by Rule 3–7.3(c) of *The Rules Regulating The Florida Bar* or as an unsworn judicial referral as outlined in Standing Board Policy 15.91 of The Florida Bar. The Bar may also lodge a complaint on its own initiative.

EXHIBIT A—Continued

3.2. **Initial Screening**

3.2.1. Upon receipt of a complaint, ACAP will create a record of the request by obtaining the contact information for both the Complainant and the Respondent. The information will then be forwarded to an ACAP Attorney for Initial Screening.

3.2.2. If the ACAP Attorney determines that the concerns raised in the complaint could be resolved informally, the ACAP Attorney will contact the Respondent to discuss the professionalism issues and provide remedial guidance as necessary, or refer the complaint to a Local Professionalism Panel. If the matter cannot be resolved informally, the ACAP Attorney will contact the Complainant and explain any further available options.

3.2.3. Upon receipt of a complaint that cannot be resolved informally, the ACAP Attorney will determine whether the allegations, if proven, would constitute a violation of *The Rules of Professional Conduct* relating to professionalism. If the ACAP Attorney determines the facts as alleged would constitute a violation, an inquiry will be opened and the ACAP Attorney will investigate the allegations. If the ACAP Attorney determines the facts as alleged would not constitute a violation, the ACAP Attorney will advise the Complainant and the Respondent of the decision not to pursue an inquiry and will provide the reasons for doing so.

EXHIBIT A—Continued

3.2.4. If the ACAP Attorney determines after investigation that the facts show the Respondent did not violate *The Rules of Professional Conduct*, the ACAP Attorney may dismiss the case after taking informal action if necessary, such as providing remedial guidance. The Complainant and Respondent will be notified of the dismissal and will be provided the reasons for doing so.

3.2.5. If the ACAP Attorney determines after investigation that a complaint warrants further action for a possible violation of one or more of *The Rules of Professional Conduct*, the ACAP Attorney will forward the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further consideration.

3.3. **Review at the Branch Level:** Upon a referral to the branch office, branch Bar counsel may dismiss the case after further review and/or investigation, recommend Diversion to a Practice and Professionalism Enhancement Program in accordance with Rule 3–5.3(d) of *The Rules Regulating The Florida Bar*, or refer to a Grievance Committee for further investigation.

3.4. **Review by the Grievance Committee:** Upon referral and conclusion of the investigation, the Grievance Committee will make one of the following findings:

A. No probable cause;

B. No probable cause and include a letter of advice to the Respondent;

C. Recommendation of Diversion to one of the Practice and Professionalism Enhancement Programs;

D. Recommendation of Admonishment for Minor Misconduct; or

EXHIBIT A—Continued

E. Probable cause. Probable cause under Rule 3–2.1 of *The Rules Regulating The Florida Bar* is a finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action.

3.5. **Confidentiality:** The confidentiality of disciplinary investigations and proceedings is outlined in Rule 3–7.1 of *The Rules Regulating the Florida Bar*. Any record of informal attempts to resolve a dispute as outlined in paragraph 3.2.2. would also be subject to the provisions of Rule 3–7.1 except that notes of any telephonic communication between the ACAP Attorney and the Complainant, the Respondent, or any third party would be considered the work product of The Florida Bar and would remain confidential and not become part of the public record.

In re STANDARD JURY INSTRUCTIONS—CONTRACT AND BUSINESS CASES.

No. SC12–1931.

Supreme Court of Florida.

June 6, 2013.

Original Proceeding—Supreme Court Committee on Standard Jury Instructions—Contract and Business Cases.

Honorable Jonathan D. Gerber, Committee Chair, and Manuel Farach, Committee Vice–Chair, West Palm Beach, FL; and Brian F. Spector, Committee Vice–Chair, Miami, FL, for Petitioner.

Back to Speaker Topics

Professionalism Expectations

"Professionalism is the pursuit and practice of the highest ideals and tenets of the legal profession. It embraces far more than simply complying with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, commitment, and civility."

- The Florida Bar Standing Committee on Professionalism

Preamble:

As The Florida Bar grows, it becomes more important to articulate the bar's professionalism expectations and for Florida lawyers to demonstrate these expectations in practice. The guidance provided in these Professionalism Expectations originates both from (1) the ethical duties established by the Florida Supreme Court in the Rules Regulating The Florida Bar and (2) the long-standing customs of fair, civil, and honorable legal practice in Florida. Where a Professionalism Expectation is coextensive with a lawyer's ethical duty, the expectation is stated as an imperative, cast in the terms of "must" or "must not." Where a Professionalism Expectation is drawn from a professional custom that is not directly provided for in the Rules Regulating The Florida Bar, the expectation is stated as a recommendation of correct action, cast in terms of "should" or "should not." To The Florida Bar, lawyer professionalism is:

1. embracing a commitment to serve others;

2. dedicating to properly using knowledge and skills to promote a fair and just result;

3. endeavoring to enhance knowledge, skills, and competence;

4. ensuring that concern for a client's desired result does not subvert the lawyer's fairness, honesty, civility, respect, and courtesy during interactions with fellow professionals, clients, opponents, public officials, members of the judiciary, or the public;

5. contributing skill, knowledge, and influence to further the profession's commitment to service and the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system;

6. enhancing the legal system's reputation by educating the public about the profession's capabilities and limits, specifically about what the legal system can achieve and the appropriate methods of obtaining those results; and

7. accepting responsibility for one's own professional conduct and the conduct of others in the profession, including encouraging other lawyers to meet these civility and Professionalism Expectations and fostering peer regulation to ensure that each lawyer is competent and public-spirited.

To reinforce and communicate its expectations of lawyer professionalism among our members, The Florida Bar adopts the following Professionalism Expectations:

1. Commitment to Equal Justice Under the Law and to the Public Good

A license to practice law is a privilege that gives the lawyer a special position of trust, power, and influence in our society. This privilege requires a lawyer to use that position to promote the public good and to foster the reputation of the legal profession while protecting our system of equal justice under the law.

Expectations:

1.1 A lawyer should avoid the appearance of impropriety.

1.2 A lawyer should counsel and encourage other lawyers to abide by these Professionalism Expectations.

1.3 A lawyer should promote the public's understanding of the lawyer's role in the legal profession and protect public confidence in a just and fair legal system founded on the rule of law.

1.4 A lawyer should not enter into a lawyer-client relationship when the lawyer cannot provide competent and diligent service to the client throughout the course of the representation.

1.5 A lawyer must not seek clients through the use of misleading or manipulative oral and written representations or advertisements. (*See* R. Regulating Fla. Bar 4-7.13 and 4-7.14). Contingency fee arrangements must be in writing and follow R. Regulating Fla. Bar 4-1.5(f).

1.6 When employed by a new client, a lawyer should discuss fee and cost arrangements at the outset of the representation and promptly confirm those arrangements in writing.

1.7 A lawyer must place a client's best interest ahead of the lawyer's or another party's interests. (*See* R. Regulating Fla. Bar 4-1.7(a)(2)).

1.8 A lawyer must maintain and preserve the confidence and private information of clients. (*See* R. Regulating Fla. Bar 4-1.6).

1.9 In any representation where the fee arrangement is other than a contingent percentage-of-recovery fee or a fixed, flat-sum fee or in which the representation is anticipated to be of more than brief duration, a lawyer should bill clients on a regular, frequent interim basis, and avoid charging unnecessary expenses to the client.

1.10 When a fee dispute arises that cannot be amicably resolved, a lawyer should endeavor to utilize an alternative dispute resolution mechanism such as fee arbitration.

1.11 A lawyer must routinely keep clients informed and attempt to resolve client concerns. (*See* R. Regulating Fla. Bar 4-1.4). In the case of irreconcilable disagreements with a client, the lawyer must provide diligent representation until the lawyer-client relationship is formally dissolved in compliance with the law and the client's best interests. (*See* R. Regulating Fla. Bar 4-1.16).

1.12 A lawyer must devote professional time and resources and use civic influence to ensure equal access to our system of justice. (*See* R. Regulating Fla. Bar 4-6.1).

1.13 A lawyer must avoid discriminatory conduct prejudicial to the administration of justice in connection with the practice of law. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2. Honest and Effective Communication

A lawyer's word is his or her bond. Effective communication requires lawyers to be honest, diligent, civil, and respectful in their interactions with others.

Expectations:

2.1 A lawyer should inform every client what the lawyer expects from the client and what the client can expect from the lawyer during the term of the legal representation.

2.2 Candor and civility must be used in all oral and written communications. (*See* R. Regulating Fla. Bar 4-8.4(c)).

2.3 A lawyer must avoid disparaging personal remarks or acrimony toward opposing parties, opposing counsel, third parties or the court. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2.4 A lawyer must timely serve all pleadings to prevent prejudice or delay to the opposing party. (*See* R. Regulating Fla. Bar 4-3.2).

2.5 A lawyer's communications in connection with the practice of law, including communications on social media, must not disparage another's character or competence or be used to inappropriately influence or contact others. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2.6 A lawyer should use formal letters or e-mails for legal correspondence and should not use text messages to correspond with a client or opposing counsel unless mutually agreed.

2.7 In drafting a proposed letter of intent, the memorialization of an oral agreement, or a written contract reflecting an agreement reached in concept, a lawyer should draft a document that fairly reflects the agreement of the parties.

2.8 In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.

2.9 A lawyer should not withhold information from a client to serve the lawyer's own interest or convenience.

2.10 A lawyer must not knowingly misstate, misrepresent, or distort any fact or legal authority to the court or to opposing counsel and must not mislead by inaction or silence. Further, the discovery of additional evidence or unintentional misrepresentations must immediately be disclosed or otherwise corrected. (*See* R. Regulating Fla. Bar 4-3.3 and 4-8.4).

2.11 A lawyer must not inappropriately communicate with a party represented by a lawyer (*See* R. Regulating Fla. Bar 4-4.2), including not responding "reply all" to e-mails.

2.12 A lawyer should diligently prepare legal forms and documents to avoid future harm or litigation for the client while ensuring compliance with the requirements of the law.

2.13 Social media must not be used to disparage opposing parties, lawyers, judges, and members of the public. (*See* R. Regulating Fla. Bar 4-8.2(a) and 4-8.4(d)).

2.14 Social media should not be used to avoid the ethical rules regulating lawyer advertising.

2.15 Social media must not be used to inappropriately contact judges, mediators, jurors, witnesses, or represented parties. (*See* R. Regulating Fla. Bar 4-3.5 and 4-4.2).

2.16 Social media must not be used for the purpose of influencing adjudicative proceedings. (*See* R. Regulating Fla. Bar 4-3.6).

2.17 A lawyer must ensure that the use of electronic devices does not impair the attorney-client privilege or confidentiality. (*See* R. Regulating Fla. Bar 4-1.6).

2.18 A lawyer must diligently respond to calls, correspondences, complaints, and investigations by The Florida Bar. (*See* R. Regulating Fla. Bar 4-8.4(g)).

3. Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play

Courtesy, cooperation, integrity, fair play, and abiding by a sense of honor are paramount for preserving the integrity of the profession and to ensuring fair, efficient, and effective administration of justice for the public.

Expectations:

3.1 A lawyer must not engage in dilatory or delay tactics. (*See* R. Regulating Fla. Bar 4-3.2).

3.2 A lawyer should not make scheduling decisions that limit opposing counsel's opportunity to prepare or respond.

3.3 A lawyer should not unreasonably oppose an adversary's motion.

3.4 A lawyer must not permit non-lawyer personnel to communicate with a judge or judicial officer on any matters pending before the judge or officer or with other court personnel except on scheduling and other ministerial matters. (*See* R. Regulating Fla. Bar 4-3.5(b) and 4-8.4(a)).

3.5 A lawyer must avoid substantive *ex parte* communications in a pending case with a presiding judge. The lawyer must notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters. (*See* R. Regulating Fla. Bar 4-3.5).

3.6 When submitting a written communication to a court or other tribunal, a lawyer should provide opposing counsel with a copy of the document contemporaneously or sufficiently in advance of any related hearing.

3.7 A lawyer must promptly prepare a proposed order, ensure that the order fairly and adequately represents the court's ruling before submitting the order to the court, and advise the court whether opposing counsel has approved the order. (*See* R. Regulating Fla. Bar 4-3.4(c)).

3.8 A lawyer should only schedule depositions to ascertain relevant facts and not to generate income or harass deponents or opposing counsel.

3.9 A lawyer must not ask a deponent irrelevant personal questions or questions designed to embarrass a deponent. (*See* R. Regulating Fla. Bar 4-4.4(a)).

3.10 A lawyer should not make improper objections in depositions.

3.11 A lawyer must not prevent a deponent from answering questions unless a legal privilege applies. (*See* R. Regulating Fla. Bar 4-3.4(c)).

3.12 When scheduling depositions, hearings, and other court proceedings, a lawyer should request an amount of time that permits all parties in the case the opportunity to be fully and fairly heard on the matter.

3.13 A lawyer should immediately provide a scheduling notice for a hearing, deposition, or trial to all opposing parties.

3.14 A lawyer should notify opposing parties and subpoenaed witnesses of a cancelled or rescheduled hearing, deposition, or trial.

3.15 During pre-trial disclosure, a lawyer should make a reasonable, good-faith effort to identify witnesses likely to be called to testify.

3.16 During pre-trial disclosure, a lawyer should make a reasonable good-faith effort to identify exhibits to be proffered into evidence.

3.17 A lawyer should not mark on or alter exhibits, charts, graphs, or diagrams without opposing counsel's permission or leave of court.

3.18 A lawyer must not threaten opposing parties with sanctions, disciplinary complaints, criminal charges, or additional litigation to gain a tactical advantage. (*See* R. Regulating Fla. Bar 4-3.4(g) and (h)).

4. Fair and Efficient Administration of Justice

The just, speedy, and inexpensive determination of every controversy is necessary to preserve our system of justice.

Expectations:

4.1 A lawyer should be familiar with the court's administrative orders, local rules, and each judge's published standing orders, practices, and procedures.

4.2 A lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible.

4.3 A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes.

4.4 A lawyer should counsel the client to consider settlement in good faith.

4.5 A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

4.6 A lawyer must not invoke a rule for the purpose of creating undue delay, or propose frivolous oral or written arguments which do not have an adequate basis in the law nor fact. (*See* R. Regulating Fla. Bar 4-3.1).

4.7 A lawyer must not use discovery to harass or improperly burden an adversary or cause the adversary to incur unnecessary expense. (*See* R. Regulating Fla. Bar 4-4.4).

4.8 A lawyer should frame reasonable discovery requests tailored to the matter at hand.

4.9 A lawyer should assure that responses to proper discovery requests are timely, complete, and consistent with the obvious intent of the request. A lawyer should not avoid disclosure unless a legal privilege prevents disclosure.

4.10 A lawyer should not respond to discovery requests in a disorganized, unintelligible, or inappropriate manner, in an attempt to conceal evidence.

4.11 A lawyer should stipulate to all facts and principles of law that are not in dispute and should promptly respond to requests for stipulations of fact or law.

4.12 After consulting with the client, a lawyer should voluntarily withdraw claims and defenses that are without merit, superfluous, or cumulative.

4.13 A lawyer should be fully prepared when appearing in court or at hearings.

4.14 A lawyer should not use *voir dire* to extract promises from or to suggest desired verdicts to jurors.

4.15 A lawyer should abstain from all acts, comments, and attitudes calculated to curry favor with jurors.

4.16 A lawyer should not express bias or personal opinion concerning any matter at issue in opening statements and in arguments to the jury.

4.17 A lawyer should not make offers or requests for a stipulation in front of the jury.

4.18 A lawyer should not use the post-hearing submission of proposed orders as an opportunity to argue or reargue a matter's merits.

4.19 A lawyer must not request rescheduling, cancellations, extensions, and postponements without legitimate reasons or solely for the purpose of delay or obtaining unfair advantage. (*See* R. Regulating Fla. Bar 4-4.4).

4.20 A lawyer must not criticize or denigrate opposing parties, witnesses, or the court to clients, media, or members of the public. (*See* R. Regulating Fla. Bar 4-8.2(a) and 4-8.4(d)).

5. Decorum and Courtesy

When lawyers display reverence for the law, the judicial system, and the legal profession by acting with respect, decorum, and courtesy, they earn the trust of the public and help to preserve faith in the operation of a fair judicial system.

Expectations:

5.1 A lawyer should abstain from rude, disruptive, and disrespectful behavior. The lawyer should encourage clients and support personnel to do the same.

5.2 A lawyer should be civil and courteous in all situations, both professional and personal, and avoid conduct that is degrading to the legal profession. (*See* R. Regulating Fla. Bar 3-4.3).

5.3 A lawyer must always behave in a courteous and formal manner in hearings, depositions, and trials and should refrain from seeking special consideration from a judge or juror.

5.4 A lawyer should refer to all parties, witnesses, and other counsel by their last names during legal proceedings.

5.5 A lawyer should request permission from the court before approaching the bench or submitting any document.

5.6 A lawyer should state only the legal grounds for an objection unless the court requests further argument or elaboration.

5.7 A lawyer should inform clients and witnesses that approving and disapproving gestures, facial expressions, or audible comments are absolutely prohibited in legal proceedings.

5.8 A lawyer should abstain from conduct that diverts the fact-finder's attention from the relevant facts or causes a fact-finder to make a legally impermissible decision.

5.9 A lawyer should address objections, requests, and observations to the judge.

5.10 A lawyer should attempt to resolve disagreements before requesting a court hearing or filing a motion to compel or for sanctions.

6. Respect for the Time and Commitments of Others

Respecting the time and commitments of others is essential to the efficient and fair resolution of legal matters.

Expectations:

6.1 A lawyer should not impose arbitrary or unreasonable deadlines on others.

6.2 A lawyer should schedule a deposition during a time period sufficient to allow all parties to examine the deponent.

6.3 Unless circumstances compel more expedited scheduling, a lawyer should provide litigants, witnesses, and other affected persons with ample advance notice of hearings, depositions, meetings, and other proceedings, and whenever practical, schedule these events at times convenient for all interested persons.

6.4 A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair, and prompt adjudication.

6.5 A lawyer should promptly agree to a proposed time for a hearing, deposition, meeting or other proceeding or make his or her own counter proposal of time.

6.6 A lawyer should promptly call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal.

6.7 A lawyer should avoid last-minute cancellations of hearings, depositions, meetings, and other proceedings.

6.8 A lawyer should promptly notify the court or tribunal when a scheduled court appearance becomes unnecessary.

6.9 A lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.

6.10 A lawyer must respond promptly to inquiries and communications from clients and others. (*See* R. Regulating Fla. Bar 4-1.4.)

7. Independence of Judgment

An enduring value of a lawyer's service is grounded in the lawyer's willingness to exercise independent judgment in practice and while giving the client advice and counsel.

Expectations:

7.1 A lawyer should exercise independent judgment and should not be governed by the client's ulterior motives, ill will, or deceit.

7.2 A lawyer should counsel a client or prospective client, even with respect to a meritorious claim or defense, about the public and private burdens of pursuing the claim as compared with the benefits to be achieved.

7.3 In advising a client, a lawyer should not understate or overstate achievable results or otherwise create unrealistic expectations.

7.4 A lawyer should not permit a client's ill will toward an adversary, witness, or tribunal to become that of the lawyer.

7.5 A lawyer must counsel a client against using tactics designed: (a) to hinder or improperly delay a legal process; or (b) to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics. (*See* R. Regulating Fla. Bar 4-1.16, 4-3.2, and 4-4.4).

7.6 In contractual and business negotiations, a lawyer should counsel the client concerning what is reasonable and customary under the circumstances.

History

The Florida Bar Commission on Lawyer Professionalism promulgated a set of Standards of Professionalism submitted to the Board of Governors in May of 1989. The Board appointed a Special Committee who revised the Standards and amended the title to the "Ideals and Goals of Professionalism." These aspirational guidelines were adopted by the Board of Governors of The Florida Bar on May 16, 1990.

The Florida Supreme Court has added the civility provision in the Oath of Admission to The Florida Bar adopted on September 10, 2011, and implemented SC13-688: Code for Resolving Professionalism Complaints adopted on June 6, 2013.

As a result of this change and a perceived decline in the lack of professionalism in the practice of law, in May 2014, The Florida Bar Standing Committee on Professionalism was requested by Bar leadership to review and develop uniform professionalism guidelines including electronic communications for statewide distribution. The Professionalism Expectations resulted from pairing existing professionalism guides with new technological concepts and this document was approved by the Standing Committee on Professionalism on October 16, 2014, and The Florida Bar Board of Governors on January 30, 2015.

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Foreword

In 1993, the Executive Council of the Trial Lawyers Section of The Florida Bar (which represents over 6,000 trial lawyers in Florida) formed a professionalism committee to prepare practical guidelines on professional conduct for trial lawyers. After reviewing the numerous aspirational and model guidelines from Florida and around the country, the professionalism committee determined that, with minor modifications, the guidelines that had been prepared by the Hillsborough County Bar Association were the best model for the entire state. Therefore, in 1994, at the request of the professionalism committee, the Executive Council of the Trial Lawyers Section unanimously approved the Guidelines for Professional Conduct. The Trial Lawyers Section then sought the endorsement of the Guidelines from the Florida Conference of Circuit Court Judges; at its meeting held in September 1995, the Conference approved the Guidelines. In so doing, the Conference asserted that the Guidelines do not have the force of law and that trial judges still have the right and obligation to consider on a case-by-case basis issues raised by the Guidelines. Since their endorsement by the Conference, the Guidelines have been followed by lawyers throughout the state and have been endorsed by administrative order in many circuits.

Beginning in 1999, the Trial Lawyers Section undertook to rewrite the Guidelines to clarify certain provisions, to make certain provisions consistent with current law, and to eliminate certain provisions considered unnecessary because they were redundant of either a rule of civil procedure or a rule of professional conduct, which lawyers are expected to follow as minimum standards of professionalism. The 2001 edition

of the Guidelines was the result of that effort, and the Section has updated and revised that initial edition. These revised Guidelines are promulgated jointly by the Conference of Circuit Court Judges, the Conference of County Court Judges, and the Trial Lawyers Section of The Florida Bar. It is hoped that dissemination of these Guidelines will give direction to both lawyers and judges concerning how lawyers should conduct themselves in all phases of trial practice. The adoption of the Guidelines by the Trial Lawyers Section also is intended to express support for trial judges who require that lawyers conduct themselves professionally.

For most lawyers, these Guidelines simply will reflect their current practice. However, it is hoped that the use of these Guidelines will continue to increase the level of professionalism in trial practice in Florida.

This 2008 edition supercedes the previous editions of the Guidelines.

Preamble

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks, few of which are easy, most of which are exacting. In the final analysis, a lawyer's duty is always to the client. In striving to fulfill that duty, a lawyer always must be conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor, diligence, and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves.

In furtherance of these fundamental concepts, the following Guidelines for Professional Conduct are adopted. It is recognized that these Guidelines must be applied in keeping with the advocacy of the interests of one's client and the long tradition of professionalism among and between members of the Trial Lawyers Section of The Florida Bar. These Guidelines are subject to the Florida and Federal Rules of Civil Procedure, the Florida Rules of Professional Conduct, and the specific requirements of any standing or administrative order, local court rule, or order entered in a specific case. Although we do not expect every lawyer to agree with every guideline, these standards reflect our best effort to encourage decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics.

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A. GENERAL PRINCIPLES

1. A lawyer is both an officer of the court and an advocate. As such, the lawyer always should strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.
2. A lawyer's word should be his or her bond.
3. A lawyer should adhere strictly to all express promises and agreements with other counsel, whether oral or in writing.
4. A lawyer should be courteous and civil in all professional dealings with other persons. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others. Lawyers can disagree without being disagreeable. Effective and zealous representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks, or acrimony toward other counsel, parties, or witnesses.
5. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.
6. When consistent with their clients' interests, lawyers should cooperate with opposing counsel to avoid litigation and to resolve litigation that already has commenced.
7. A lawyer must not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or to unnecessarily prolong litigation or increase litigation expenses.

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B. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME

1. Attorneys must, except in extraordinary circumstances, communicate with opposing counsel before scheduling depositions, hearings, and other proceedings -- to schedule them at times that are mutually convenient for all interested persons.
2. On receipt of an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer promptly should agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible.
3. As soon as they become apparent, a lawyer should call to the attention of those affected, including the court or tribunal, potential scheduling conflicts or problems.
4. Attorneys should cooperate with each other when conflicts and calendar changes are necessary and requested.
5. Counsel never should request a calendar change or misrepresent a conflict to obtain an advantage or delay. However, in the practice of law, emergencies will arise that affect our families or our professional commitments and create conflicts that make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes, and should make requests of other counsel only when absolutely necessary.
6. Attorneys must, except in extraordinary circumstances, provide opposing counsel, parties, witnesses, and other affected persons sufficient notice of depositions, hearings, and other proceedings.

7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.
8. A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair, and prompt consideration and adjudication of the client's claim or defense.
9. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery, or motions, ordinarily should be granted between counsel as a matter of courtesy unless time is of the essence.
10. After a first extension, any additional requests for time should be addressed by balancing the need for expedition against the deference one ordinarily should give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely that a court would grant the extension if asked to do so.
11. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."
12. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.
13. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions, such as preserving the right to seek reciprocal scheduling concessions. However, when granting extensions, a lawyer should not seek to preclude an opponent's substantive rights, such as the right to move against a complaint.
14. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

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C. SERVICE OF PAPERS

1. Papers should not be served to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day before a secular or religious holiday. A "paper" is any written material that is to be filed with a court or other tribunal.
2. Service should be made personally, by facsimile transmission, or by electronic mail when it is likely that service by mail, even when allowed, will not provide the opposing party with adequate time to review the paper before a court appearance.
3. Facsimile equipment and email systems should not be turned "off" during counsel's usual working hours in order to prevent opposing counsel from communicating or serving papers.

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D. WRITTEN SUBMISSIONS TO COURTS, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS, AND DECLARATIONS

1. Copies of any submissions to the court (correspondence, memoranda of law, case law, and so forth) should be provided simultaneously to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, a copy should be hand-delivered or faxed to opposing counsel at the same time. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel when the material is submitted to the court. Sending an additional copy by electronic mail also is encouraged, if possible.
2. Papers, including memoranda of law, should not be served at court appearances unless the proponent agrees to give opposing counsel reasonable time following the court appearance in which to respond to the papers. If papers, including memoranda of law, are served before a court appearance, those papers should not be served so close in time to the court appearance as to inhibit the ability of opposing counsel to prepare for that appearance or to respond to the papers.
3. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity, or personal behavior of one's adversary, unless those characteristics or actions are directly and necessarily in issue.

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E. COMMUNICATION WITH ADVERSARIES

1. Counsel always should be civil and courteous in communicating with an adversary, whether in writing or orally.
2. Letters or electronic mail should not be written to ascribe to one's adversary a position that the adversary has not taken or to create "a record" of events that have not occurred.
3. Unless specifically permitted or invited by the court, letters and electronic mail, between counsel should not be sent to judges.

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F. DEPOSITIONS

1. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. Depositions never should be used as a means of harassment or to generate expense.
2. When scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and deponents, when it is possible to do so without prejudicing the client's rights.

3. When scheduling depositions on oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.
4. Counsel should not attempt to delay a deposition for dilatory purposes, but only if necessary to meet real scheduling problems.
5. Counsel should not inquire into a deponent's personal affairs or integrity when that inquiry is not relevant to the subject matter involved in the pending action.
6. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner that is intended to harass a witness, such as by repeating questions after they have been answered, by raising one's voice, or by appearing angry at the witness.
7. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Florida or Federal Rules of Civil Procedure or applicable case law. Counsel should remember that most objections are preserved and need be interposed only when the form of the question is defective or when privileged information is sought. When objecting to the form of a question, counsel simply should state: "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, they should be stated succinctly.
8. While a question is pending, counsel should not coach the deponent nor suggest answers, through objections or otherwise.
9. Counsel should refrain from self-serving speeches during depositions.
10. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer, including disparaging personal remarks or acrimony toward opposing counsel, and gestures, facial expressions, audible comments, or the like as manifestations of approval or disapproval during the testimony of the witness.

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G. DOCUMENT DEMANDS

1. When responding to unclear document demands, receiving counsel should attempt to discuss the demands with propounding counsel so that the demands can be complied with fully or appropriate objections can be raised.
2. Document production should not be delayed to prevent opposing counsel from inspecting documents before scheduled depositions or for any other tactical reason.
3. A lawyer should never use document demands for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.
4. After becoming aware that an action has been initiated and to the extent practicable, a lawyer should become generally familiar with the client's records and storage systems, including electronic media, so that the lawyer may properly advise the client on production, preservation, and protection of relevant data, records, and the treatment of privileged or private information during litigation.

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H. INTERROGATORIES

1. In responding to interrogatories whose meaning is unclear, receiving counsel should attempt to discuss the meaning with propounding counsel so that the interrogatories can be answered fully or appropriate objections can be raised.
2. Objections to interrogatories should be based on a good faith belief and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.
3. A lawyer should never use interrogatories for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.

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I. MOTION PRACTICE

1. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever practicable. For example, before setting for hearing a nondispositive motion, counsel shall make a reasonable effort to resolve the issue.
2. A lawyer should not force an adversary to make a motion and then not oppose it.
3. After a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should be submitted immediately to the court. The order fairly and accurately must represent the ruling of the court.
4. Before submitting a proposed order to the court, attorneys should provide the order to opposing counsel for approval, either orally or in writing. Opposing counsel then promptly should communicate any objections. As soon as objections are made, the drafting attorney immediately should submit a copy of the proposed order to the court and advise the court whether the proposed order has been approved by opposing counsel.

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J. EX PARTE COMMUNICATIONS WITH COURTS AND OTHERS

1. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom the case is pending.
2. Before making an authorized ex parte application or communication to the court, a lawyer should make diligent efforts to notify the opposing party or a lawyer known or likely to represent the opposing party and to accommodate the schedule of that lawyer to permit the opposing party to be represented on the application. A lawyer should make an ex parte application or communication (including an application to shorten an otherwise applicable time period) only when there is a bona fide emergency that will result in serious prejudice to the lawyer's client if the application or communication is made on regular notice.
3. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters.
4. A lawyer should be courteous and may be cordial to a judge, but should never show marked attention or unusual informality to the judge. A judge should be referred to by surname in court. A lawyer should avoid anything calculated to gain, or to have the appearance of gaining, special personal consideration or favor from a judge.

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K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

1. An attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.
2. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
3. In every case, counsel should consider whether the client's interest could be served adequately and the controversy disposed of more quickly and economically by expedited trial, voluntary trial resolution, arbitration, mediation, or other forms of alternative dispute resolution.

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L. TRIAL CONDUCT AND COURTROOM DECORUM

1. A lawyer always should interact with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and judges with courtesy and civility, and should avoid undignified or discourteous conduct that is degrading to the court or the proceedings.
2. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses or at any other time, absolutely are prohibited.
3. During trials and evidentiary hearings, the lawyers mutually should agree to disclose the identities and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual aid equipment.
4. A lawyer should abstain from conduct calculated to detract or divert the fact finder's attention from the relevant facts or otherwise cause the fact finder to reach a decision on an impermissible basis.
5. A lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion nor permit the lawyer's silence or inaction to mislead anyone.
6. In appearing in his or her professional capacity before a tribunal, a lawyer should not **a.** state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence; **b.** ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; **c.** assert a personal knowledge or opinions concerning the facts in issue, except when testifying as a witness; **d.** assert a personal opinion concerning the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters at issue.
7. A question should not be interrupted by an objection unless the question is patently objectionable or there is a reasonable ground to believe that information is being included that should not be disclosed to the jury.
8. When a judge already has made a ruling about the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although the lawyer may make a record for later proceedings of the ground for urging the admissibility of the evidence in question. This does not preclude efforts by the lawyer to have the evidence admitted through other, proper means.
9. A lawyer scrupulously should abstain from all acts, comments, and attitudes calculated to curry favor with any juror, by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like.
10. A lawyer never should attempt to place before a tribunal or jury evidence known to be clearly inadmissible, nor make any remarks or statements intended improperly to influence the outcome of any case.
11. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not affected adversely.

[Revised: 12-22-2015]

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THE FLORIDA BAR, Complainant,

v.

Robert Joseph RATINER, Respondent.

No. SC08–689.

Supreme Court of Florida.

June 24, 2010.

As Revised on Rehearing Sept. 30, 2010.

Background: The Florida Bar initiated disciplinary proceedings against attorney. A referee recommended disbarment.

Holdings: The Supreme Court held that:

(1) attorney's conduct, during a deposition, in lambasting counsel over the deposition table and tearing up the evidence sticker and flicking it at opposing counsel, violated the professional rules, and

(2) suspension from the practice of law for 60 days, coupled with a public reprimand and a period of probation, was warranted.

Public reprimand and suspension ordered.

1. Attorney and Client ⇐38, 42

Attorney's conduct, during a deposition, in attempting to run around the table toward opposing counsel after counsel placed an evidence sticker on attorney's laptop computer, lambasting counsel over the deposition table, and tearing up the evidence sticker and flicking it at opposing counsel, violated the professional rules that prohibited a lawyer from using means that had no substantial purpose other than to embarrass, delay, or burden a third person, engage in conduct in connection with the practice of law that was prejudicial to the administration of justice, or engage in conduct that is disruptive to a tribunal. West's F.S.A. Bar Rules 3–4.3, 4–3.5, 4–4.4(a), 4–8.4(a, d).

2. Attorney and Client ⇐59.5(4)

It was not necessary for an attorney's misconduct to have been a basis for discipline in order for it to be considered an aggravating factor.

3. Attorney and Client ⇐57

A referee's findings in aggravation carry a presumption of correctness, in an attorney disciplinary proceeding, and should be upheld unless clearly erroneous or without support in the record.

4. Attorney and Client ⇐59.5(5)

Merely because there is some evidence pertaining to a mitigating factor in an attorney disciplinary case does not mean that that evidence rises to the level necessary to support a finding of that mitigator.

5. Attorney and Client ⇐59.13(3), 59.17(3)

Suspension from the practice of law for 60 days, coupled with a public reprimand and a period of probation in which attorney was required to undergo mental health counseling and prepare and mail letters of apology to the deponent, the court reporters, and the videographer present during deposition at issue, was warranted, in attorney disciplinary case where attorney, during a deposition, attempted to run around the table toward opposing counsel after counsel placed an evidence sticker on attorney's laptop computer, lambasted counsel over the deposition table, and tore up the evidence sticker and flicked it at opposing counsel, in violation of the professional rules. West's F.S.A. Bar Rules 3–4.3, 4–3.5, 4–4.4(a), 4–8.4(a, d).

6. Attorney and Client ⇐57

In reviewing a referee's recommended discipline, in an attorney disciplinary case, the Supreme Court's scope of review is broader than that afforded to the referee's

findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction.

7. Attorney and Client ⇐57

The Supreme Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Standards for Imposing Lawyer Sanctions.

John F. Harkness, Jr., Executive Director and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, FL, and Randi Klyman Lazarus, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

Kevin P. Tynan of Richardson and Tynan, PLC, Tamarac, FL, for Respondent.

PER CURIAM.

We have for review a referee's report recommending that respondent Robert Joseph Ratiner, a member of The Florida Bar since 1990, be found guilty of professional misconduct and disciplined. We have jurisdiction. *See* art. V, § 15, Fla. Const.

For the reasons explained below, we approve the referee's findings of fact and recommendations as to guilt. We also approve the mitigating factors and the aggravating factors found by the referee. With regard to discipline, however, we disapprove the referee's alternative recommendations of disbarment or a two-year suspension. Instead, we impose a public reprimand and a suspension of sixty days, followed by two years' probation with certain conditions.

BACKGROUND

The Florida Bar filed a complaint alleging ethical violations and seeking discipline against respondent, who is plaintiffs' counsel in a civil suit against E.I. DuPont de Nemours & Co., Inc. (DuPont) regarding alleged harm to plaintiffs from their exposure to Benlate. The Bar sought discipline for alleged misconduct during a deposition of a representative of DuPont that was held in Wilmington, Delaware, during May 14–18, 2007. The Bar's complaint charged respondent with violations of the following Rules Regulating the Florida Bar: 3–4.3 (Misconduct and Minor Misconduct); 3–4.4 (Criminal Misconduct); 4–3.5 (Disruption of a Tribunal); 4–4.4(a) (In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.); 4–8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.); 4–8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.); 4–8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.).

After the filing of the complaint, the matter was referred to a referee. The Bar presented as evidence to the referee, with-

out objection from respondent, the video recording and transcript of the entire five-day deposition. The Bar also presented as evidence to the referee, again without objection from respondent, information about respondent's 2006 diversion to the Bar's practice and professionalism enhancement program to resolve a grievance previously filed against him. The referee possessed all of this evidence prior to conducting the summary judgment hearing. The parties then filed respective motions for partial summary judgment on the issue of guilt. At the hearing on the motions for partial summary judgment, the Bar clarified that its complaint was solely based on alleged misconduct that was captured in a three-minute video clip involving a confrontation between respondent and opposing counsel with regard to respondent's personal laptop computer ("laptop incident"). The Bar affirmatively advised the referee that it was limiting its complaint to the laptop incident and did not intend to address any other video recordings or portions of the transcript from the five-day deposition that it submitted to the referee. The Bar advised the referee of the limitation of the complaint because the grievance committee had previously considered other instances of alleged misconduct by respondent during the May 2007 deposition and had found no probable cause for finding professional violations except for the laptop incident.

After the hearing, the referee granted portions of the Bar's motion for partial summary judgment, basing his findings of fact and conclusions of law on the Bar's motion, its attachments, and the video clip of the laptop incident. The referee recommended that respondent be found guilty of violating rules 3–4.3, 4–3.5, 4–4.4(a), 4–8.4(a), and 4–8.4(d). The referee made the following findings of fact in support of his recommendation of guilt.

> During the course of the deposition, [opposing counsel] attempted to place an exhibit sticker on the Respondent's laptop computer.
>
> Just prior to [opposing counsel's] attempting to place the exhibit sticker on the computer, the Respondent was standing up and speaking forcefully towards [opposing counsel].
>
> As soon as [opposing counsel] attempted to place the exhibit sticker on the computer, the Respondent very briefly touched [opposing counsel's] hand, then attempted to run around the table towards [him].
>
> Additionally, the [deponent] expressed that she was very scared as a result of the Respondent's conduct.
>
> The Respondent's own consultant had to attempt to calm the Respondent down and specifically told the Respondent to "take a Xanax."
>
> Further, while the Respondent was acting as described above, the court reporter stated, "I can't work like this!"
>
> Respondent then proceeded to forcefully lean over the deposition table, lambast [opposing counsel] in a tirade while proceeding to tear up the evidence sticker, wad it up and flick or toss it in the direction of [opposing counsel].
>
> The Respondent's conduct during the deposition was outrageous, disruptive, and intimidating to the witness, opposing counsel, and other persons present during the deposition and otherwise prejudicial to the administration of justice.

The referee also granted portions of respondent's motion for partial summary judgment, finding that respondent did not commit any criminal acts during the laptop incident and thus concluded that respondent was not guilty of violating rules 3–4.4 and 4–8.4(b).

Nearly a month after the initial hearing, the referee held a sanction hearing. The referee heard testimony from respondent, his trial consultant, and one of his law partners about respondent's character and good reputation. The referee also considered affidavits filed by the deponent and the court reporter present during the laptop incident.

After considering the above, the referee ultimately made two alternative recommendations as to discipline. As his primary recommendation, the referee recommends that respondent be disbarred. As to this recommendation, the referee stated:

> I recognize that disbarment is an extreme sanction.... The practice of law is a privilege. The Supreme Court of Florida has the power to revoke the license of an attorney whose unfitness to practice law has been duly established. The Florida Bar, in this case before me, has established that unfitness.

(Citation omitted.)

In making this recommendation, the referee found and considered the following aggravating and mitigating circumstances. In aggravation, the referee found that respondent (1) exhibited a pattern of misconduct, (2) committed multiple offenses, (3) refused to acknowledge the wrongful nature of his conduct, and (4) had substantial experience in the practice of law. The aggravating factor of a pattern of misconduct was based in part on various acts of the respondent during the 2007 deposition, for which the grievance committee found no probable cause and for which the respondent was not charged. Those acts included the utterance by the respondent of a series of belligerent, abusive, and vulgar comments in the course of the 2007 deposition. The pattern-of-misconduct aggravating factor was also based on the conduct underlying a grievance committee report of diversion filed in September 2006. That report related in part to abusive conduct by the respondent at depositions in a case beginning in 2002.

In mitigation, the referee found that respondent had (1) an absence of a prior disciplinary history, (2) an absence of a dishonest motive, and (3) emotional problems. The referee also found as additional mitigation the fact that respondent "appear[ed] to have an intelligent understanding of the law, as well as the facts surrounding the various cases he [was] prosecuting on behalf of his clients."

As an alternative to the recommendation of disbarment, the referee recommends "Plan B"—a two-year suspension with conditions. In making this alternative recommendation, the referee stated: "Outrageous misconduct in court and at depositions must be subject to discipline. Attorneys who believe they will not be sanctioned or disciplined for unprofessional conduct will, by nature, continue to try and get away with it."

Additionally, the referee recommends that the following conditions should accompany any imposed discipline: (1) a requirement that respondent attend mental health counseling to address anger management; (2) a requirement that future depositions conducted or attended by respondent be videotaped or that he be required to have co-counsel present at such depositions; and (3) a requirement that respondent write letters of apology to the persons involved in the May 2007 deposition—the deponent, all court reporters, and the videographer.

Respondent challenges whether he should be disbarred based on his conduct during a single deposition when he has no prior disciplinary history. Respondent initially argued that public reprimand is the appropriate discipline in this case. How-

ever, at the oral argument, he acknowledged that a short-duration suspension with other conditions might be the appropriate suspension. Respondent further argues that the referee failed to consider mitigating factors and improperly considered certain matters as aggravating factors. Finally, he argues that the referee's probationary term that requires all of his future depositions to be videotaped is not authorized under the Rules Regulating the Florida Bar. The Bar answers the issues raised by respondent and in turn raises a single issue on cross-petition, arguing that a suspension for two years is appropriate because respondent has "habitually terrorized attorneys and others with explosive behavior."

ANALYSIS

[1] Neither party challenges the referee's findings of fact and recommendations as to guilt. We therefore approve those findings and recommendations without further comment.

[2, 3] First, we consider the respondent's challenge to the pattern-of-misconduct aggravating factor. A referee's findings in aggravation carry a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. *See Fla. Bar v. Ticktin*, 14 So.3d 928, 936 (Fla.2009); *Fla. Bar v. Arcia*, 848 So.2d 296, 299 (Fla.2003); *see also Fla. Bar v. Morse*, 784 So.2d 414, 415–16 (Fla. 2001); *Fla. Bar v. Bustamante*, 662 So.2d 687, 687 (Fla.1995); *Fla. Bar v. Hecker*, 475 So.2d 1240, 1242 (Fla.1985).

Contrary to the respondent's argument, it is not necessary for misconduct to have been a basis for discipline in order for it to be considered in aggravation. Here, the respondent's pattern of engaging in abusive conduct is relevant to the appropriate sanction to be imposed for the violations at issue in this case. We therefore reject the respondent's argument regarding aggravation.

[4] Next, respondent urges us to find additional mitigation in this case, specifically: (1) absence of a selfish motive on the part of respondent; (2) his good character and reputation; and (3) respondent's expression of remorse. Merely because there is some evidence pertaining to a mitigating factor does not mean that that evidence rises to the level necessary to support a finding of that mitigator. *Cf. Ticktin.* Here, we conclude that the referee's failure to find such alleged mitigation is not clearly erroneous. Therefore, we reject respondent's argument that we should apply additional mitigating factors in considering the appropriate discipline to be imposed in this case.

[5] Finally, both parties seek review of the referee's alternative recommendations as to discipline. Respondent seeks review of the referee's nonfinding of other mitigating factors, the alternative recommendations for disbarment or a two-year suspension, and the recommended probationary conditions. The Bar seeks review, arguing in favor of the referee's recommended two-year suspension, with the probationary conditions.

[6, 7] In reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson*, 538 So.2d 852, 854 (Fla.1989); *see also* art. V, § 15, Fla. Const. However, generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer*, 753 So.2d 555, 558 (Fla.1999). Here, we disapprove the

referee's alternative recommendations for discipline because neither of his recommendations for discipline is reasonably based on existing caselaw and the standards.[1]

The referee reported that he considered the following cases prior to recommending discipline: *Florida Bar v. Tobkin*, 944 So.2d 219 (Fla.2006); *Florida Bar v. Morgan*, 938 So.2d 496 (Fla.2006); *Florida Bar v. Morgan*, 791 So.2d 1103 (Fla.2001);[2] *Florida Bar v. Martocci*, 791 So.2d 1074 (Fla.2001); *Florida Bar v. Martocci*, 699 So.2d 1357 (Fla.1997); *Florida Bar v. Wasserman*, 675 So.2d 103 (Fla.1996); *DeBock v. State*, 512 So.2d 164 (Fla.1987); *Florida Bar v. Hirsch*, 342 So.2d 970 (Fla. 1977); *Florida Bar v. Thomson*, 271 So.2d 758 (Fla.1972); *Florida Bar v. Pahules*, 233 So.2d 130 (Fla.1970). However, it is evident from the referee's report that he found little or no relation between the cases cited above and the facts in this case. The referee acknowledges that his "review of the case law set [forth] reveals that there is no case directly on point with the misconduct set forth in the Bar's complaint." Nonetheless, the referee urges us to impose the recommended discipline on respondent, even though there is a dearth of caselaw on point that provides support for imposing disbarment or a two-year suspension. The Bar also acknowledges that the existing caselaw does not support a recommendation that disbarment or a two-year rehabilitative suspension be imposed for the kind of misconduct involved in this case. We decline to impose either of the alternative recommended sanctions. Rather, we disapprove the recommendations as not reasonably based on existing caselaw or standards.[3]

We find that two of the cases cited by the referee have some relevance to the facts before us: *Tobkin*, 944 So.2d at 219, and *Morgan*, 938 So.2d at 496. In both of these cases the respondents were found guilty of violating their professional duties and were disciplined by lengthy suspensions for exhibiting behavior that is comparable to the misconduct respondent Ratiner displayed in the laptop incident. Respondent Tobkin received a ninety-one-day suspension for engaging in unprofessional behavior during pretrial discovery. Respondent Morgan also received a ninety-one-day suspension for verbally abusing a judge. Yet, the instant case is distinguishable from the referenced cases. First, in *Tobkin* and *Morgan* each respondent exhibited more egregious behavior than that of which respondent Ratiner has been found guilty. In *Tobkin*, the respondent was charged in a four-count complaint with violating Bar rules in connection with his representation of two plaintiff clients in medical malpractice lawsuits. *See Tobkin*, 944 So.2d at 219.

1. Referees assigned to enter findings of fact and to make recommendations as to guilt in lawyer disciplinary cases should present a *single* recommended sanction having its basis in the case law and the standards.

2. We disposed of this disciplinary case against respondent Morgan by way of an unpublished order.

3. The referee relied upon standard 7.1 to support disbarment. Standard 7.1 provides:

> Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

However, the report of the referee is unclear as to how he believes that respondent knowingly caused *serious* or *potentially serious* injury to the public or the legal system. Furthermore, there is nothing in the record on review that provides support for such a determination, which is crucial for applying standard 7.1. Thus, we conclude that standard 7.1 is inapplicable here.

Tobkin was found to have exhibited objectionable conduct during pretrial discovery and objectionable behavior at a cancer treatment center—snatching medical records from opposing counsel—that resulted in security personnel being called to restrain him. *See id.* at 221–22. Tobkin was also found guilty of disobeying court orders and filing sham pleadings in the course of representing clients. *See id.* at 226. In *Morgan*, the respondent was involved in a hostile and disrespectful verbal tirade directed at the presiding judge in open court during a felony trial. *See Morgan*, 938 So.2d at 497–98. By comparison, the misconduct of respondent here was directed at opposing counsel in a conference room at a civil discovery deposition. Additionally, both Tobkin and Morgan had been previously disciplined for certain similar misconduct. Respondent Ratiner has not been previously disciplined by this Court.

As for relevant standards, standard 7.2 provides: "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." Here, respondent's misconduct caused injury to the legal system itself. His unprofessional behavior occurred in Delaware and in the presence of the deponent, a member of the public, and others. It is evident that respondent's brief grabbing of opposing counsel's hand, his movement around the conference table, and his act of tearing off the exhibit sticker and flicking the wadded-up sticker at opposing counsel during the laptop incident were intentional acts that he knew or certainly should have known violated his professional duties as a Florida attorney. Respondent's unprofessional, belligerent conduct during the laptop incident is an embarrassment to all members of The Florida Bar.[4]

Based on standard 7.2 and the cases discussed above, we conclude that respondent Ratiner should be suspended from the practice of law for sixty days. Even though the suspension term imposed is not one that would require respondent to prove rehabilitation prior to reinstatement, we must emphasize that respondent's behavior during the laptop incident was unacceptable and unbecoming of any member of the Bar, especially one who has been a practicing attorney for more than nineteen years. In recognition of this, we determine that the sanction of a suspension should be coupled with a public reprimand and should be followed by a two-year period of probation. During the probationary period, respondent shall be required to undergo mental health counseling and prepare and mail letters of apology to the deponent, the court reporters, and the videographer present during the May 2007 deposition at issue. Further, during the probationary period, he shall be accompanied by co-counsel approved by the Bar during any depositions and other legal proceedings where a judge is not presiding or, alternatively, he shall ensure that such appearances or proceedings are video-recorded.

CONCLUSION

Accordingly, Robert Joseph Ratiner is hereby directed to appear before the Board of Governors of The Florida Bar for a public reprimand at a date and time to be determined by the Board. *See* R. Regulating Fla. Bar 3–5.1(d). He is also suspended from the practice of law for sixty days, followed by two years' probation un-

4. The referee has suggested and we agree that members of the Bar and law students could view the video recording of the laptop incident in the context of a course on professionalism as a glaring example of how not to conduct oneself in a legal proceeding.

der the conditions as set forth above. The suspension will be effective thirty days from the filing of this opinion so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall accept no new business from the date this opinion is filed until the suspension is completed.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399–2300, for recovery of costs from Robert Joseph Ratiner in the amount of $3,665.83, for which sum let execution issue.

It is so ordered.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

Marc E. BOSEM, M.D., et al., Petitioners,

v.

MUSA HOLDINGS, INC., etc., et al., Respondents.

No. SC09–1277.

Supreme Court of Florida.

Sept. 23, 2010.

Background: Physician brought action against eye clinic and its owner, alleging fraud and false advertising, and seeking injunctive relief and compensatory damages related to defendants' alleged unauthorized use of physician's image or likeness in violation of state law and Lanham Act. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Ronald J. Rothschild, J., granted physician's motion for partial summary judgment and, after subsequent bench trial on issue of damages, awarded physician $93,306 in lost profits, plus prejudgment interest. Parties appealed and cross-appealed. The District Court of Appeal, Polen, J., 8 So.3d 1185, affirmed in part and reversed in part. Physician sought review which was granted.

Holding: The Supreme Court held that physician could recover prejudgment interest.

Decision quashed.

1. Appeal and Error ⇐893(1)

On a pure question of law, Supreme Court's standard of review is de novo.

2. Interest ⇐39(2.6, 2.15)

Under the loss theory, neither the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest, but, rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property; plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.

3. Interest ⇐39(2.20, 2.50)

Physician's prejudgment interest on $93,306 award for lost profits was ascertainable and not speculative in action against eye clinic and its owner for fraud and false advertising, and, thus, he could recover prejudgment interest.

105B

AMERICAN CIVIL TRIAL BAR ROUNDTABLE
A WHITE PAPER ON INCREASING THE PROFESSIONALISM OF AMERICAN LAWYERS

Collaborative Points of Agreement by the National Legal Associations Concerned with Trial Practice and Known as the American Civil Trial Bar Roundtable*

I. INTRODUCTION

The American Civil Trial Bar Roundtable has been in existence since 1997. There are 14 participating organizations. The Roundtable brings together the most significant law or bar related organizations and trial practitioners representing diverse viewpoints in the civil trial bar. Participants acknowledge lack of consensus on some issues, but express common belief in the importance of the civil trial system to the American justice system and the importance of a forum for the exchange of ideas.

The Roundtable occasionally issues White Papers on issues participating organizations find to be of significant importance to maintaining the American justice system, especially the civil trial system. The Roundtable issued a White Paper in 2000, revised in 2006, concerning the state of the civil justice system in the United States with recommendations for strengthening it.[1]

This White Paper builds on our earlier 2006 White Paper, which noted:

1. America's civil justice system is the envy of other nations in both the developed and undeveloped world.
2. The civil justice system operates best when each party is on as level a playing field as possible with regard to trial resources and litigants are represented by qualified and competent counsel.
3. A sophisticated economic system like that in place in the United States needs a reliable judicial system rendering fair and impartial justice.[2]

The 2006 White Paper also observed:

> . . . the legal system and . . . civil trial practice in particular have come under rather sharp attack. Lack of respect and confidence seems to have developed in the public's mind for . . . trial practice and trial practitioners of all types. Much of the criticism appears without justification but nevertheless has taken hold . . . the perception of lack of civility of lawyers toward one another leading to "win at any cost" tactics and hardball ultimatums have reduced the public's esteem of lawyers

* The assistance in the preparation of this white paper of the Nelson Mullins Riley Scarborough Center on Professionalism and Dean Emeritus John E. Montgomery at the University of South Carolina School of Law are acknowledged.

[1] American Civil Trial Bar Roundtable, A White Paper Concerning an Overview of the Civil Justice System (2000, revised Sept. 9, 2006).

[2] *Id.* at 2.

2. State Bar Professionalism Committees

Almost half of the states and the District of Columbia have bar professionalism committees.[21] Four states have both court commissions and professionalism committees with complimentary missions.[22] A number of states have ethics and professional responsibility committees, which do not separately address professionalism,[23] although a few deal with both areas.[24]

Like commissions, state bar professionalism committees generally have specific responsibilities for promoting professionalism. One of their major responsibilities has been developing professionalism standards for their states. Specific activities of these committees include: promoting professionalism to the profession and the public, sponsoring programs to increase ethical, professional conduct, and educating newly admitted members of the bar on professionalism.[25]

3. Bar Professionalism Codes, Creeds, Principles and Standards

Almost two thirds of state bars, the District of Columbia, scores of local bars and many federal district courts have adopted professionalism standards.[26] While they generally cover all aspects of professionalism, civility is the most widely addressed topic. While language varies, most standards, codes, or creeds emphasize the core values of the profession: honesty, integrity, civility, and service. Those values are also affirmed by Roundtable organizations.
The accompanying charts included in the Appendix categorize these standards by topics covered. Appendix A summarizes by state the most common standards, the majority of which address civility. Appendix B includes standards on areas of professionalism other than civility.

4. Oaths

A significant number of states have some form of civility oath. In 12 states, the oaths are incorporated into the oath of admission prescribed by the state's supreme court and are included

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[21] Twenty-six states have such commissions. For details, see the Nelson Mullins Professionalism website, *supra* note 18 and the ABA Center on Professional Responsibility website, http://www.americanbar.org/groups/professional_responsibility.html (last visited Aug. 7, 2013).

[22] Florida, Georgia, Maryland, New York. The Florida Bar professionalism committee specifically supports that state's supreme court professionalism commission. *See* Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It*, 79 FLA. BAR J. 38, n.3 (2005).

[23] Twelve states have such bar committees. For details, see Nelson Mullins Professionalism website, *supra* note 18.

[24] Indiana and Maryland.

[25] In states without supreme court professionalism commissions, bar professionalism committees have responsibilities similar to commissions. In general, they have not been as involved as court commissions in mentoring and in sponsoring regular meetings of all parts of the profession on professionalism.

[26] There are well over one hundred different professionalism codes, guidelines, standards, and creeds. Some states have both codes and creeds. Guidelines and codes tend to focus more on specific types of conduct, creeds on the central values of the profession. See Rizzardi, *supra* note 22, for a discussion of Florida's guidelines, ideals, and creed.

in a court rule, making them enforceable.[27] In other states, civility language makes reference to rules of professional conduct which prohibits any action which interferes with the administration of justice.[28]

5. Mandatory CLE Programs

Currently, 44 states have mandatory CLE requirements. Forty-three of the forty-four require some portion of hours (usually 1 or 2) be on ethics or professional responsibility.[29] Nineteen states allow either ethics or professionalism to fulfill that requirement.[30]

6. Mentoring Programs

The majority of states have some form of mentoring program for newly admitted attorneys. A number of these are mentor-match programs where, if requested, the bar assists in locating a mentor.[31] These programs are extremely limited in scope and the number of new lawyers who participate is hard to determine. Of much great impact are the 13 voluntary and 8 mandatory mentoring programs, which operate on a statewide basis.[32] Georgia pioneered mandatory mentoring for all newly admitted lawyers and its program is about a decade old. Ohio has an extremely successful voluntary program with a large percentage of those eligible participating.[33] These programs have become models for other state programs. All these programs place significant emphasis on professionalism and the core values of the profession.

There are also a large number of local bar mentoring programs, which often mirror the structure of state programs. Texas has a particularly strong system of local bar-based mentoring programs

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[27] For typical language, see the South Carolina oath, which states "to opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications." *See* http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=402&subRuleID=&ruleType=APP (last visited Aug. 28, 2013). The Alaska oath states, "I will be candid, fair and courteous before the court and other attorneys." *See* http://www.courts.alaska.gov/bar.htm#5 (last visited Aug. 5, 2013).

[28] Most states have disciplinary rules based on ABA Model Rules of Professional Conduct Rule 8.4(d), which provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

[29] Conversation with Mary Germack, Director, South Carolina Supreme Court Continuing Education Commission (Oct. 15, 2012).

[30] *Id.*

[31] A compilation and description of all state mentoring programs can be found at the websites in *supra* note 21.

[32] Voluntary and mandatory programs handle the vast majority of new lawyers participating in statewide mentoring, probably exceeding 95%. Mentor-Match programs have few participants.

[33] According to Lori Keating, Secretary of the Ohio Supreme Court Professionalism Commission, about two-thirds of eligible lawyers in Ohio participate (Interview, Aug. 1, 2012).

in most of the state's largest metropolitan areas.[34] Further, some national legal organizations provide mentoring or otherwise participate in mentoring. The American Inns of Court Model Mentoring Program, available for use by local inns, is an example.[35]
Mentoring is rapidly growing in the legal profession. Many firms, in addition to bars, have strong mentoring programs. A recently formed national organization, the National Legal Mentoring Consortium, with representatives from bars, courts, law schools, law firms, and corporations, is working to facilitate effective mentoring practices throughout the profession.[36] Most mentoring programs are regularly evaluated and participants, both mentors and mentees, report they are highly effective in addressing problems of new lawyers.[37] These programs now provide mentoring to some 9,500 new lawyers each year, about 20 percent of all new lawyers annually admitted to practice.[38]

7. Law Schools

A decade ago, few law schools placed any emphasis on professionalism. That has started to change with the publication of influential studies on legal education[39] and pressures from legal employers to graduate students better prepared for practice. While a strong focus on professionalism can be found at only a few law schools,[40] most law schools are incorporating

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[34] State Bar of Texas, Texas Bar Transition to Practice Program, http://www.texasbar.com/AM/Template.cfm?Section=Transition_to_Practice (last visited Aug. 7, 2013).

[35] *See* http://home.innsofcourt.org (last visited Aug. 7, 2013).

[36] *See* http://www.legalmentoring.org (last visited Aug. 6, 2013).

[37] Good examples are the evaluation processes established at the start of statewide mentoring in Georgia, Ohio, and South Carolina. These evaluations, conducted during every mentoring cycle, indicate that around 90% of participants find mentoring to be valuable in learning the proper way to practice, introducing new lawyers to the "culture" of law practice and in increasing satisfaction with practice.

[38] Derived from ABA statistical information on the number of lawyers admitted annually and from state bar and court statistics on the number of participants in statewide mentoring programs. For the most comprehensive information on mentoring, see NALP FOUNDATION, THE STATE OF MENTORING IN THE LEGAL PROFESSION (2013).

[39] *See* WILLIAM M. SULLIVAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

[40] A comprehensive assessment of professionalism programs in American law schools can be found in Alison D. Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57 (2012). A consortium of law schools making up the National Institute for the Teaching of Ethics and Professionalism (NIFTP) has a particularly strong focus on professionalism. Member Schools are: Georgia State (Headquarters school), Mercer, Fordham, Indianan-Bloomington, St. Thomas and the University of South Carolina. The Halloran Center at St. Thomas focuses on professional identity formation. The Nelson Mullins Riley Scarborough Professionalism Center at the University of South Carolina specializes in mentoring. All member schools have specialized and innovative courses emphasizing professionalism.

professionalism in orientation programs, specific classes or clinics, lectures and other programs. A rapidly growing number of law schools have established mentoring programs,[41] special lectures on professionalism and awards. Schools in states with court professionalism commissions usually work with those commissions' on professionalism initiatives.[42]

Law schools, while perhaps slower than the rest of the profession to make professionalism a priority, are making an increasingly important contribution. First, they serve as valuable "laboratories" in trying and evaluating new ways to introduce professionalism. With some 200 ABA accredited law schools in the United States, the sheer number and diversity of their approaches to professionalism is indeed impressive. With time, some best practices to introducing professionalism to law students will emerge. Second, law schools are serving as important collectors and disseminators of information on professionalism initiatives both in legal education and in the profession.[43] It is far easier than a decade ago to access information on professionalism in the profession because some law schools are regularly collecting the information.[44] This is an important addition to the ABA Center for Professional Responsibility's valuable website[45] and makes information sharing much easier. Finally, law schools, are increasingly relying on lawyers, judges, and members of national legal organizations to lecture and participate in professionalism programs. This brings a measure of real world practice experience beyond the capabilities of most law schools.

8. National Legal Organizations

Many national legal organizations, especially Roundtable members, place significant emphasis on professionalism generally or one of its major components. They have been leaders in the professionalism movement. As representative examples, the American Board of Trial Advocates has established a Code of Professionalism, Principles of Civility, Integrity and Professionalism

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Also of note are programs at the University of Denver Sturm College of Law, which have a strong professionalism focus. Educating Tomorrow's Lawyers (ETL) collects information on law school courses which have a professionalism focus. *See* http://educatingtomorrowslawyers.du.edu (last visited Aug. 7, 2013), which is an initiative of the Institute for the Advancement of the American Legal System at the University of Denver Sturm College of Law.

[41] Of special note are the three-year mandatory mentoring programs for all students at St. Thomas Law School, the situational mentoring program at Cooley Law School and the combined legal profession class, mandatory mentoring and judicial observation program for the first year students at the University of South Carolina School of Law.

[42] Most supreme court commissions have law school representatives. The Georgia, Ohio, and South Carolina commissions are representative examples.

[43] *See* Educating Tomorrow's Lawyers website, *supra* note 40; Nelson Mullins Riley & Scarborough Center on Professionalism website, *supra* note 18.

[44] In part this reflects the establishment of centers and initiatives at several law schools which regularly collect and disseminate information about professionalism generally and programs involving professionalism.

[45] *See* ABA Center for Professional Responsibility, *supra* note 21.

and the educational publication "Civility Matters."[46] The Defense Research Institute, the voice of the defense bar supports excellence and fairness in the civil justice system.[47] DRI's Substance Law Committee on Professionalism and Ethics coordinates with the organization's other committees to make sure every DRI seminar has professionalism panels and supports work with law schools. The American Association for Justice promotes a fair and effective justice system and access to justice.[48] The International Association of Defense Counsel supports enhanced skills and professionalism to serve clients, the civil justice system, and society.[49] The International Academy of Trial Lawyers, with both plaintiff and defense members and prosecutors and civil defense attorneys, supports law reform, facilitates the administration of justice, promotes the rule of law internationally and elevated standards of integrity, honor, and courtesy in the legal profession.[50] The Federal Bar Association, serving the needs of the federal public and private practitioner and the judiciary, supports the sound administration of justice and professional and ethical practice in the federal bar.[51] The Federation of Insurance and Corporate Counsel is "dedicated to pursuing professionalism . . . and a course of balanced justice."[52] The Association of Defense Trial Attorney, ". . . champions the jury trial system as being essential to an American system of jurisprudence."[53] The Association of Defense Counsel of Northern California ". . . promotes the administration of justice . . ." and enhancing ". . . the standards of civil defense practice."[54] The American Inns of Court promotes professionalism, ethics, and integrity and has established a professionalism creed.[55] The American Bar Association through its many committees, sections, and divisions, places significance on professionalism. The Torts and Insurance Practice section, the Standing Committee on Professionalism, the Professionalism Consortium, the Young Lawyers Division and the Gambrell Professionalism Award are representative of the ABA's work in the area of professionalism.[56]

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[46] https://www.abota.org/ (last visited Aug. 7, 2013).

[47] http://www.dri.org/about (last visited Aug. 7, 2013).

[48] http://www.justice.org/cps/rde/xchg/justice/hs.xsl/418.htm (last visited Aug. 7, 2013).

[49] http://www.iadclaw.org/about/association.aspx (last visited Aug. 7, 2013).

[50] http://www.iatl.net/i4a/pages/index.cfm?pageID=3511 (last visited Aug. 7, 2013).

[51] http://www/fedbar.org/About-us/FBA-Mission.aspx (last visited Aug. 19, 2013).

[52] http://www.thefederation.org/process.cfm?pageid=1 (last visited Aug. 19, 2013).

[53] htttp://www.adtalaw.com/shared/content/adtahistory.pdf (last visited Aug. 19, 2013).

[54] http://www.adcnc.org/about.asp (last visited Aug 19, 2013).

[55] *See supra* note 35.

[56] Professionalism programs of the ABA can be accessed through its website. *See* http://www.americanbar.org/aba.html (last visited Aug. 7, 2013). One valuable recent ABA publication is *Essential Qualities of the Professional Lawyer* (Paul A. Haskins ed. 2013).

The commitment of these organizations is representative of the work and purposes of many others. Collectively, national legal organizations demonstrate impressive commitment to professionalism. Through programs for their members, educational initiatives such as ABOTA's "Civility Matters," these organizations provide significant support for a strong civil trial system. For the most part, the efforts of these organizations are focused on their members and not on outreach to the profession generally. A few, for example, the ABA, ABOTA and the American Inns of Court, have programs more broadly directed at the profession. Several are actively engaged in law reform efforts.[57]

9. Bar, Bar Counsel and Disciplinary Office Initiatives

A significant number of state bars and bar and disciplinary counsel offices conduct training, educational and rehabilitation programs with an emphasis on professionalism. They are far too numerous and diverse to categorize. The Texas Center for Legal Ethics, for example, offers numerous courses, which emphasize ethics and professionalism.[58] Its course on professionalism is an excellent example.[59] Professionalism, especially civility, is also a common topic in many state "bridge the gap" programs for new lawyers. Disciplinary offices and bar counsel talk widely to lawyer groups and some states have "schools" for lawyers who have been warned or sanctioned for unprofessional conduct,[60] usually day-long remedial programs on specific topics.

10. Other Significant Judicial and Bar Initiatives

Courts in Florida and Utah have created, by court order, new mechanisms designed to address unprofessional conduct. The Colorado Bar has established a similar process. These are innovative new approaches which hold promise.

The Utah Supreme Court has established a board of five counselors to "counsel and educate members of the Bar concerning the Court's Standards of Professionalism and Civility."[61] The purposes of the board are to counsel lawyers on professionalism issues in response to complaints by other lawyers and referrals from judges, to provide counseling upon request from lawyers about their obligations under the standards, provide CLE on the standards and publish advice and information on the board's work. The board will respond to complaints, inquiries, and referrals from lawyers and judges but not from the public. Complaints may be resolved by face-to-face meetings or by written advisory opinions, which may also be provided to the attorneys, supervisors, or employers.

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[57] The ABA is a prime example.

[58] http://www.legalethicstexas.com/courses/online-courses/Justice-James-A--Baker-Guide-to-the-basics-of--%281%29.aspx (last visited Aug. 7, 2013).

[59] http://www.legalethicstexas.com/Courses/Live-Courses/Justice-James-A-Baker-Guide-to-the-Basics-of-Law-P.aspx (last visited Aug. 7, 2013).

[60] South Carolina is typical of many states which offer remedial courses through the office of the Supreme Court Disciplinary Counsel.

[61] The text of the Utah Supreme Court Standard Order No. 7, which was effective April 1, 2008, and revised in 2012, is at http://www.utcourts.gov/resources/rules/urap/supctso.htm (last visited Aug. 7, 2013)

In June 2013, the Florida Supreme Court issued an order establishing a Code for Resolving Professionalism Complaints, based on a proposal from the Supreme Court of Florida Professionalism Commission.[62] The new Florida Code prohibits members of the Florida Bar from engaging in "unprofessional conduct," defined as "substantial or repeated violations of the Florida Bar Oath of Admission, the Florida Bar Creed of Professionalism, the Florida Bar Ideals and Goals of Professionalism, the Rules Regulating the Florida Bar and the decisions of the Florida Supreme Court."[63]

The Code provides that complaints be directed either to the Attorney Consumer Assistance and Intake Program or a local district professionalism panel. If the complaint involves violation of a disciplinary rule, it will be handled by normal disciplinary procedures. If the complaint involves unprofessional conduct, which does not constitute a disciplinary rule violation, it will be handled either by the attorney intake process or a local district panel. Any person, including non-lawyers, may initiate a complaint. The Florida Bar may also initiate complaints on its own initiative.[64] Complaints may be resolved informally, such as by providing remedial guidance. There are also procedures for review by the Grievance Committee and a number of possible actions such as letters of advice and recommendations for diversion to a practice and professionalism enhancement program.[65]

The Colorado Bar has established the Peer Professionalism Assistance Group which offers assistance on professionalism issues. Judges and lawyers can refer attorneys to the group for such matters as lack of cooperation in scheduling, refusing to communicate, personal attacks and rude, contentious communications. Matters are addressed and resolved through mentoring, counseling, and other informal means. Complaints are addressed by single members or by panels. [66]

The approaches of the Utah and Florida supreme courts and the Colorado Bar are new avenues to strengthening professionalism beyond the philosophy of education on professionalism followed universally by bars, courts, legal organizations, and law schools. For the first time, two courts and a state bar have established processes for raising professionalism complaints not involving separate violations of court or professional responsibility rules and having them resolved. The Utah and Colorado processes also allow for guidance, similar to obtaining ethics advisory opinions. By creating these newer procedures there will also be the opportunity to collect

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[62] *See* Supreme Court of Florida Code for Resolving Professionalism Complaints, *supra* note 18.

[63] *Id.* at 6.

[64] *Id.* at 8.

[65] *Id.* at 9.

[66] http://www.cobar.org/index.cfm/ID20950 (last visited Aug 19, 2013).

information on the number of unprofessional conduct cases arising in the three states, a metric so far, unavailable elsewhere.[67]

11. The Use of Judicial Sanctions and Disciplinary Actions for Unprofessional Conduct

Judicial sanctions for unprofessional conduct are uncommon, except in limited circumstances involving particularly egregious conduct.[68] They are not appropriate for broad application. Professionalism is universally considered to be aspirational, a level of practice which every lawyer should aspire to achieve, not something mandated because of ethical requirements.[69] Many bar professionalism codes and standards specifically state that professionalism codes and standards are not to be used as the basis of disciplinary actions. Trial judges are also sometimes reluctant to take valuable court time to resolve disputes between lawyers which often have little to do with the merits of the case. In the words of the Supreme Court of Florida, "professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances."[70] Establishing clear standards on which sanctions for unprofessional conduct could be based, in the areas of reflective judgment or self-understanding, for example, is not feasible and could raise free speech concerns. Accordingly, initiatives to strengthen professionalism in its broad scope have focused on educating lawyers about the various aspects of professionalism and its importance to the profession.

Judicial sanctions are not a broadly applicable or effective means to improve professionalism beyond their current use for clearly egregious behavior. Professionalism is not a lawyering trait amenable to clear standards enforceable by sanctions.[71] Further, expanded use of sanctions cuts against the fundamental aspirational basis of professionalism.

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[67] Both Utah and Colorado have some experience with their respective programs. Over the past few years, the Utah Professionalism Board has dealt with approximately 50 complaints. Most involved civility issues, both inadvertent and "tactical." The Utah process has been particularly helpful for new lawyers unsure about how to deal with a particular situation. The Colorado program has experienced a comparable volume of complaints, again with most dealing with civility. Colorado has a much larger group (15 versus 5 in Utah) to deal with complaints and consequently, a group of panelists with more diverse practice experience. Both programs engage in outreach programs to educate lawyers about using the programs. (Interview with Robert Clark, Chair, Utah Supreme Court Professionalism Board, Aug. 18, 2013, and John Baker, Director, Colorado Mentoring Program and member, Colorado Bar Peer Professionalism Assistance Group, Aug. 19, 2013).

[68] The majority of cases involve discovery abuse. *See* e.g. – For egregious examples of sanctionable conduct in discovery, see State v. Mumford, 731 A.2d 831 (Del. Super. 1999) (repeated use of obscenities by client during deposition, which lawyer made no attempt to control); Mullaney v. Aude, 730 A.2d 759 (Md. Ct. Spec. App. 1999) (male lawyer addressed female opposing counsel as "bimbo" and "babe" during deposition). See Eric D. Miller, Lawyers Gone Wild: Are Depositions Still a "Civil Procedure," 42 CONN. L. REV. 1527 (2010), for a comprehensive discussion.

[69] *See* Hannaford, *supra* note 15.

[70] *See supra* note 18, at 2.

[71] For example, in PNS Stores, INC. v. Rivera, 379 S.W. 34 267-77 (Tex. 2012), the Supreme Court of Texas stated the Lawyer's Creed was intended to encourage lawyers to be mindful that abusive tactics–

There are however, limited areas where disciplinary actions for very specific types of unprofessional conduct have been based on court rulescourt rules. Civility, an important part of professionalism, is part of the oath of admission in several states and falls within court rules.[72] Based on court rules requiring civility and on administration of the justice system, several states have imposed disciplinary sanctions such as public reprimands or suspensions for egregious uncivil conduct.[73]

VI. OBSERVATIONS ON CURRENT INITIATIVES TO STRENGTHEN PROFESSIONALISM

Efforts to strengthen the professionalism of American lawyers through broad education efforts are truly impressive. Virtually the entire legal profession has implemented a broad range of professionalism initiatives. Chief Justice Warren Burger's call to improve professionalism has been embraced by the profession.

Two critical questions remain: have these initiatives been effective in increasing the professionalism of practicing attorneys and what more can and should be done?

Insight into those questions comes from the Supreme Court of Florida's rule creating a structure for resolving professionalism complaints, a rule adopted after Florida already had a professionalism code, a professionalism creed and a civility oath in place. The Court observed, "Although it is impossible to determine with scientific certainty the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by

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ranging from hostility to obstructionism–do not serve justice. *Id.* at 276. The court continued that the Lawyer's Creed serves as an important reminder that the conduct of lawyers "should be characterized at all times by honesty, candor, and fairness." *Id.* (citing the Lawyer's Creed) However, the court also stated that the Lawyer's Creed is aspirational. *Id.* "It does not create new duties and obligations enforceable by the courts beyond those existing as a result of (1) the courts' inherent powers and (2) the rules already in existence." *Id.* at 276-77"

[72] South Carolina had three significant disciplinary cases involving violation of its civility oath in 2011 alone. *See In re* White III, 707 S.E.2d 411 (S.C. 2011) (sanctions for letter suggesting opposing counsel had "no brains" and questioning if "he has a soul"; argument he was acting on client wishes rejected); *In re* Anonymous Member of South Carolina Bar, 709 S.E.2d 633 (S.C. 2011) (derogatory remarks in email to opposing counsel suggesting counsel's daughter involved with drugs, which had no relation to legal matter at issue); *In re* Lovelace, 716 S.E.2d 919 (S.C. 2011) (attorney threatened and slapped a witness during deposition). The first recorded South Carolina case sanctioning a lawyer for uncivil conduct was decided in 1850. See The State v. B.F. Hunt, 355 S.C. L. (4 Strob.) 322, 1850 WL 2817 (1850). *See also In re* Abbott, 925 A.2d 482 (Del. 2007) (violation of attorney oath by accusing another lawyer of fabrication; civility not incorporated in court rule); *cf.* Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962 (Utah 2007) (uncivil language in brief). Michigan has no oath but has sanctioned lawyers for incivility through its professional responsibility rules. Grievance Adm'r v. Fiezer, 719 N.W.2d 123 (Mich. 2006). For a review of civility cases involving written documents, see Judith D. Fischer, *Incivility in Lawyers Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365 (2011). A very useful discussion of civility cases is Donald A. Winder, Enforcing Civility in an Uncivilized World (unpublished paper, available from the author, at Winder and Counsel PC, Salt Lake City Utah, updated July 17, 2013).

[73] *Id.*

preventing a further decline . . ."[74] This observation of the Florida Supreme Court is worth elaboration because it is probably representative of reactions to professionalism initiatives across the profession.

First, since professionalism is considered to be aspirational, the overriding strategy behind professionalism initiatives has been educational. Standards, codes, CLE programs, lectures and articles, the core of most professionalism initiatives, all are aimed at informing lawyers of the various aspects of professionalism and proper responses to specific practice situations. Less frequently, some states have adopted oaths and make reference to central professional values. Remedial measures such as disciplinary actions have been used only in limited circumstances where court rules prohibit certain kinds of unprofessional conduct, for example, incivility. Second, despite the comprehensiveness of professionalism education initiatives, there has been no real measurement of their effect. No doubt, all these educational efforts have had some success in improving professionalism but the extent of the improvement is uncertain. The common experience of many in the profession and a few surveys suggest that unprofessional conduct remains at unacceptably high levels.[75] It is hard to say whether some, any or all the professionalism initiatives have had major impact because of insufficient data collection. As a profession, we have been responsible for adopting a broad range of initiatives designed to strengthen professionalism but have not followed up with measuring their effectiveness. Third, most professionalism initiatives do not explicitly state a central purpose or focus on why professionalism is important. Some also do not set out the central values of the profession such as integrity, civility, ethics and a commitment to service. This is in contrast to the values often referred to in the missions of many national legal organizations.[76] That one of the most important purposes of professionalism is to support the rule of law and the civil justice system also is rarely referenced in most initiatives. As a consequence, lawyers are not reminded sufficiently of the core values of the profession or the importance of professionalism to the operation of the justice system.

Finally, of all the professionalism initiatives in place, mentoring is the one approach that clearly makes a positive difference. States with both mandatory and voluntary statewide programs such as Georgia, South Carolina, Utah, and Ohio have conducted extensive evaluations of their programs. They have found that mentoring works well in introducing lawyers to the important values of the profession, helps them develop proper habits and increases their satisfaction with practice.[77]

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[74] *See* Supreme Court of Florida Code for Resolving Professionalism Complaints, *supra* note 18, at 2.

[75] *See* SURVEY ON PROFESSIONALISM, *supra* note 7. An early study on the frequency of unprofessional conduct is Wayne D. Brazil, *Views from the Front Lines*, 1980 AM. B. FOUND. RES. J. 217 (1980).

[76] *See supra* notes 46-57 and accompanying text.

[77] *See supra* note 37.

At one level, mentoring of course is an educational process, usually in one-on-one or small group settings. As such, it is consistent with the broad education strategy of professionalism initiatives generally. Yet mentoring is different because it relies on close interpersonal contact and building a relationship of trust with another experienced, professional lawyer. This process is effective in conveying the importance of professionalism and establishing a norm of professional conduct.[78]

The central goal in the profession's commitment to increase professionalism should be to instill a norm of professional conduct in lawyers. The Conference of Chief Justices National Action Plan stated as much over two decades ago.[79] Current initiatives, while laudatory in both scope and content, do work but only to a point. There remain a group of lawyers, unknown in size but probably significant, for whom professionalism is not a practice norm or at least not an important factor in how they practice. Nor is it likely that current initiatives will persuade them otherwise. Establishing a more broadly accepted professionalism norm requires both an understanding of existing behavior and barriers to changing unprofessional conduct. For some lawyers lack of professionalism may be attributable to lack of knowledge about the importance of professionalism or what it requires in a particular practice setting. For this group, the current education approach should work. There are, however, other barriers to change which are more difficult to overcome. Some lawyers may respond unprofessionally because of their belief that these clients expect "hardball" tactics. Addressing this may be not so much a lawyer education issue but a client education issue. Lawyers should educate their clients about what is professional in a representation and exercise their independent judgment about how to address their client's needs.[80] Both national legal organizations and bars should urge lawyers to better educate their clients on the importance of civility and consider adding a client education component to professionalism codes and creeds. This could specifically address the assertions of many lawyers that they are only doing what their clients demand. Finally, there are lawyers who believe "win at any cost" tactics benefit them financially or produce better results for their clients, no matter what the costs to others or to the civil trial system itself. For them, unprofessional conduct is perhaps nothing more than a strategy of winning embraced in the notion of zealous advocacy. Of course, it is not. Such lawyers in effect are treating the civil justice system as a "free good" allowing the use of any "legal" or "ethical" tactic without regard to the costs or consequences to others or to the civil trial system itself. They are certainly not fulfilling their professional obligations to the justice system.

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[78] *See* THE STATE OF MENTORING IN THE LEGAL PROFESSION, *supra* note 38, at 127.

[79] *See* Hannaford, *supra* note 15.

[80] Some state bar professionalism codes and creeds actually suggest this. See, for example, the Arizona Lawyer's Creed which instructs attorneys to inform clients of the importance of civility ("I will advise my client that civility and courtesy are not equated with weakness."), *available at* http://www.azbar.org/membership/admissions/lawyer'screedofprofessionalism (last visited Aug. 22, 2013). *See also* Denis T. Rice, *Incivility In Litigation: Causes and Possible Cures* 10 (unpublished paper prepared for ABA Tort Trial and Insurance Practice Session 2013 Annual Meeting, Aug. 13, 2013, San Francisco, CA) ("A lawyer should educate his or her client to appreciate that incivility will not benefit the client's interest. Not only do hardball battles over discovery drive up the fees, but it rarely improves the client's litigation posture. The client should understand that credibility with counsel and the court is a highly valuable asset").

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The challenge here is to strengthen the professionalism of the great majority of American lawyers who already practice with professionalism and pursue a more effective strategy to change the behaviors of the group who do not. How ideas, innovations and values become norms which are widely adopted has been exhaustively studied. It is well established that the ideas and innovations of small groups become the norms of the great majority through a process social scientists refer to as diffusion.[81] Education can introduce an idea broadly but people are far more likely to actually adopt it and make it a norm when others they know and trust embrace the idea and provide personal evidence of its importance. Peer-to-peer communication and the influence of peer networks are crucial to the process. This process is known to work in professional groups like physicians in the adoption of new practice standards.[82] The process of diffusion is also remarkably similar to what goes on in a mentoring environment where an experienced professional who practices with professionalism as a norm transmits an approach to practice based on the central values of the profession. Related to this is the common observation that lawyers are less likely to act improperly to other lawyers they know and handle matters with repeatedly. It is far easier to be uncivil to a lawyer in a single matter than one likely to be seen again. The growth of the profession and handling more matters through exchange of paper and email has reduced personal contact and the opportunity for the diffusion process to have as great an effect.[83]

This is to suggest that if we as a profession want to strengthen professionalism further and reach lawyers who do not see or are indifferent to its importance, we must think beyond the current education strategy. To be sure, the education strategy common in the professionalism movement works and must be continued. It should, however, be more focused and tied more directly to the importance of professionalism to the rule of law and the effective operation of the civil justice system. The professionalism panels created by the Florida and Utah supreme courts and the Colorado Bar are a promising middle ground to resolve professionalism complaints informally using something similar to a mediation process.

Mentoring offers significant promise in furthering professionalism. It does require individual commitment to the intensive task of transmitting to others appropriate practice norms. Yet thousands of lawyers are already engaged in state, local, firm and law school mentoring program around the country. A broader commitment to mentoring in the profession would certainly be in keeping with other professionalism obligations such as service to the profession. Increasing transmittal of the importance of professionalism both to individual lawyers and even to clients, has the potential beyond current initiatives to strengthen professionalism and could reach a broader audience than education initiatives alone. Obviously, mentoring can have the greatest long-term benefit if it is focused on new lawyers.

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[81] The standard work is EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS (5th ed. 2003). There are more than 6,000 research studies and field tests of this process.

[82] *See* Soumerai et al., *Effect of local medical opinion leaders on quality of care for acute myocardial infarction: A randomized controlled trial*, 279 J. AM. MED. ASS'N 1358 (1998).

[83] For a discussion, see Rice, *supra* note 79, at 2–3.

Finally, the whole area of professionalism suffers from a lack of hard information on the frequency and types of unprofessional conduct occurring. Ways to bridge this information gap are clearly important.

VII. Points of Agreement and Recommendations

Professionalism of lawyers is essential to the effective operation of the civil justice system, which in turn is crucial to the rule of law and a democratic society. Strengthening the civil justice system has long been a priority of the Civil Trial Bar Roundtable. The following recommendations to strengthen professionalism will contribute to a strong civil trial system, which operates with fairness, effectiveness, and efficiency:

1. The professionalism movement so far has concentrated on educating lawyers about the various aspects of professionalism. It needs more focus. Current professionalism initiatives could be more effective if they have a central focus on supporting rule of law principles, the civil justice system, and the core values of the profession: honesty, integrity, civility, and service. While current initiatives are impressive in scope and have drawn the active involvement of bars, courts, legal organizations, and law schools, few articulate a central purpose of professionalism or the central values of the profession. A new focus on the importance of professionalism to the rule of law and the civil justice system could improve their effectiveness and should be encouraged. Also, a new emphasis on lawyers educating their clients should be added to professionalism codes and creeds. This, coupled with other efforts to better educate clients on the importance of civility, could improve professionalism.

2. Civility oaths based on rules of court have been adopted in several states. Courts are using violations of these oaths as the basis of disciplinary sanctions and lawyers consequently can see the limits of appropriate conduct. Efforts to incorporate civility oaths into court rules should be encouraged in those states which have not yet adopted them.

3. New initiatives by the Florida and Utah supreme courts and the Colorado Bar to establish professionalism boards to resolve professionalism complaints informally appear promising. They are important first steps in creating a mechanism to address professionalism issues which fall outside the scope of disciplinary rules. If these approaches prove successful, their adoption by other bars and state supreme courts should be encouraged and supported.

4. Mentoring can take many forms and is rapidly increasing in the legal profession. It is demonstrably effective in transmitting the "culture" of a professional approach to law practice. It also is known to be one of the most effective ways in establishing new behavioral norms where education alone won't succeed. Mentoring can be most effective in impressing on new lawyers the importance of professionalism. Its increased use in the legal profession should be strongly encouraged and supported.

5. Supreme court professionalism commissions have been the most active organizations in the profession in dealing with professionalism by bringing together all stakeholders.

They operate in only about 25% of the states. Their creation in every state should be encouraged.

6. Hard information on the frequency of unprofessional conduct, either nationally or in individual states, is difficult to obtain and not routinely collected. Nor have the effectiveness of individual initiatives such as professionalism codes been evaluated. The only exception here is mentoring which is evaluated in most states on an ongoing basis. More comprehensive gathering of data on professionalism and the effectiveness of various initiatives should be encouraged. As a part of this process, the Civil Trial Bar Roundtable supports the development of a "professionalism directory" for each state. This directory would be a qualitative state-by-state measure of the breadth of each state's professionalism efforts. Possibilities for inclusion are the existence of supreme court commissions, bar committees, professionalism standards, civility oaths, bar and disciplinary counsel programs, mentoring, CLE programs on professionalism, access to justice initiatives, working with law schools and data gathering. This is not an inclusive list. The Roundtable supports such an effort and is willing to participate in a meaningful way in its development.

7. The Civil Trial Bar Roundtable, through local groups of its national organizations, encourages active involvement with as many law schools as possible. The experience of individuals in member organizations could be invaluable in assisting law schools to strengthen their professionalism programs. This is a time of declining enrollments and tight resources for law schools. They could benefit from the active participation of Roundtable organizations and their members in increasing the professionalism and skills of law students.

NINTH JUDICIAL CIRCUIT COURTROOM DECORUM POLICY

The purpose of this policy is to state certain basic principles concerning courtroom behavior and decorum. When appearing in this Court, unless excused by the presiding Judge, all counsel (including all persons at counsel table) shall abide by the following:

1. Stand when Court is opened, recessed or adjourned. Stand when addressing, or being addressed by the Court. Stand when the jury enters or retires from the courtroom. When making opening statements, closing arguments or examining witnesses, do not approach either the jury or the witness without the Court's permission. Remain at the lectern unless using exhibits or charts.
2. Address all remarks to the Court, not to opposing counsel or the opposing party.
3. Avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill feeling between the litigants or witnesses.
4. Refer to all persons, including witnesses, other counsel and the parties by their surnames and not by their first or given names unless the permission of the Court is sought in advance.
5. Only one attorney for each party shall examine, or cross examine each witness. The attorney stating objections, if any, during direct examination, shall be the attorney recognized for cross examination.
6. Counsel should request permission before approaching the bench. Any documents counsel wishes to have the Court examine should be handed to the clerk. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a witness for his examination; and any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.
7. No exhibit, whether marked for identification or not, shall be held in any manner, or placed in any position in the courtroom, that would allow the trier of fact to see the exhibit unless it has been admitted into evidence and permission to publish the exhibit to the jury has been obtained from the Court.
8. In making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the Court.
9. When examining a witness, counsel shall not repeat or echo the answer given by the witness.
10. Offers of, or requests for, a stipulation should be made privately, not within the hearing of the trier of fact.
11. In opening statements and in arguments to the trier of fact, counsel shall not express personal knowledge or opinions concerning any matter in issue.
12. Counsel shall admonish all persons at the counsel table who make gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time. This behavior is strictly prohibited.
13. All parties, attorneys and witnesses should refrain from interrupting or talking over one another.
14. Counsel shall refrain from attempting to make a re-argument after the Judge has ruled.
15. Counsel shall complete resolution negotiations and advise clients of their settlement options in advance of court hearings.
16. No tobacco use in any form is permitted. No bottles, beverage containers, paper cups or edibles are allowed in the courtroom, except as permitted by the Court. No gum chewing is permitted.
17. Cell phones and pagers should be turned off or in a vibrate mode. Computers should be used with audio off.
18. All counsel shall provide a copy of this policy to clients prior to coming to court.
19. Pursuant to Family Law Rule of Procedure 12.407, no children are allowed in the courtroom, waiting area or adjacent hallway without prior approval of the court, unless the child(ren) is a party to the action.

8/07/14

BALANCING THE SCALES: THE GROWTH AND DEVELOPMENT OF CIVILITY STANDARDS FOR JUDGES

Donald J. Winder[1]

In the practice of law, the twenty-first century has been witness to a sea change in how those in the legal profession are expected to conduct themselves. As civility has decreased in society at large over time, incivility on the part of attorneys seemed to become distilled to its purest form as a desirable trait in the practice of law. However, slow but steady progress has been made in replacing this "ideal" with a recognition and embrace of civility in the practice of law. Following the path that has been blazed in the establishment of civility guidelines and standards for attorneys, many states are now bringing similar guidelines of civility to members of the judiciary.

The American Board of Trial Advocates ("ABOTA") has long been at the forefront of promoting civility in the legal profession. The ABOTA Principles of Civility provided the benchmark for establishing a framework for civility in all aspects of the legal profession. As a result of ABOTA's efforts and similar efforts in state and local bar associations and courts throughout the country, civility standards for lawyers are now the norm, rather than the exception.

ABOTA's standards for judges as detailed in the ABOTA Principles of Civility, Integrity, and Professionalism outline the conduct expected of judges. Specifically, judges are to observe the following Principles:

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.
2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.
3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with layers, parties, or witnesses.
4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel if possible.
5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings and conferences. When possible, avoid scheduling matters for a time that conflicts with counsel's required appearance before another judge.
6. Make all reasonable efforts to promptly decide matters under submission.
7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.
8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.
9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.

10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.
11. Require court personnel to be respectful and courteous towards lawyers, parties, and witnesses.
12. Abstain from adopting procedures that needlessly increase litigation time or expense.
13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Following ABOTA's lead in this area, there are currently 16 states with some form of judicial standards for civility and professionalism. Of those, Delaware,[2] Hawaii,[3] Idaho,[4] Louisiana,[5] Maryland,[6] Minnesota,[7] New Mexico,[8] and Oklahoma[9] are directly based on the ABOTA standards. Another four jurisdictions, District of Columbia,[10] New York,[11] Pennsylvania,[12] and West Virginia[13] have developed standards loosely based on the ABOTA standards. Three additional states have created standards without the guiding framework of the ABOTA standards, New Jersey,[14] Ohio,[15] and Wisconsin[16]. Regardless of the specific language or pedigree, all these jurisdictions are united in their commitment to civility in all aspects of the legal profession, including the judiciary.[17]

As was the case with the development of civility standards for attorneys, Utah has been part of the early vanguard of states and jurisdictions working to put into place similar standards for judges. The Utah Supreme Court Committee on Professionalism, which was an integral part of the development of civility standards, the establishment of a program of professionalism counseling for members of the Utah Bar and placing civility in the oath for admission, established a Subcommittee on Proposed Standards of Judicial Civility and Professionalism[18] to proposed judicial civility standards.

In developing the proposed standards for the Utah judiciary, members of the Subcommittee examined the judicial standards of civility and professionalism currently existing throughout the country. Using these various models, the Subcommittee created draft standards for judges. These standards were distilled from the ABOTA standards, along with creative and meaningful modifications and additions found in the standards of various other jurisdictions. The Subcommittee's efforts resulted in principles for judges, approved by the Utah Supreme Court, as well as the Judicial Conduct Commission, as part of the Utah Standards of Judicial Professionalism and Civility.[19] Specifically, the Utah Standards state:

1. Judges will refrain from manifesting or acting upon racial, gender, or other improper bias or prejudice toward any participant in the legal process.
2. Judges will not use language in oral or written communications, orders, or opinions that is profane or that gratuitously demeans or humiliates an attorney, litigant, witness, or other judge, recognizing, however, that judges are sometimes expected to stand up to obstinacy or insubordination with sharpness and even severity, and that the difficult

legal or factual determinations they make might produce a demeaning or humiliating effect on a participant in the judicial process.

3. Judges will not disparage the integrity, motives, intelligence, morals, ethics, or personal behavior of an attorney, litigant, witness or other another judge except in circumstances where such matters are in furtherance of a judge's responsibilities or are otherwise relevant under the governing law or rules of procedure. Judges will not impugn the integrity or professionalism of any lawyer on the basis of the client or cause which the lawyer represents.

4. Judges will avoid impermissible ex parte communications

5. Judges will not adopt procedures aimed at delaying the resolution of proceedings before them or at compounding litigations expenses unnecessarily.

6. Judges will endeavor to begin judicial proceedings on time and to provide reasonable notice if necessary to apprise the parties, recognizing that circumstances beyond the judge's control may impact the goal of punctuality.

7. Judges will give issues of controversy thoughtful and impartial analysis and consideration, recognizing the corresponding prerogative and responsibility to promote their just, speedy, and inexpensive resolution.

8. Judges will recognize that a party has a right to a fair and impartial hearing and a right to present its cause within the limits established by law. Judges will allow lawyers or parties, with reasonable time limits, to present proper arguments and to make a complete and accurate record.

9. In all legal proceedings, judges will direct parties, attorneys, and other participants to refrain from uncivil conduct. Judges who observe uncivil conduct or receive a reliable report of uncivil conduct will take corrective action as the judge deems appropriate.

10. Judges will cooperate with other judges to ensure the successful management of the court as a system as well as the judge's individual docket.[20]

As the world changes and becomes less civil, there is no need for the legal profession to follow suit. Attorneys and educators have been working for many years to bring civility to our profession, with the expansion of civility rules across the country, as well as Canada.[21] ABOTA continues to champion this cause and welcomes the efforts to develop and implement similar civility rules for the judiciary as a necessary and complimentary step for the continued recognition and respect of the legal profession.

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[1] Don Winder is managing partner in the firm Winder & Counsel, PC, Salt Lake City, Utah. Mr. Winder has been practicing for over 40 years and he has a varied trial and transactional practice focusing on business, commercial and real estate law. Special thanks to Jerald V. Hale who is an administrative law judge for the Arizona Department of Transportation, for his assistance in preparing this article.

[2] http://courts.state.de.us/forms/download.aspx?id=39418

[3] http://www.courts.state.hi.us/docs/court_rule/rules/pphj.pdf
[4] http://isb/idaho.gov/pdf/general/standards_for_civility.pdf
[5] http://www.lasc.org/rules/supreme/PartGSection11.asp
[6] http://www.msba.org/departments/commpubl/publications/code.asp
[7] http://www2.mnbar.org/committees/professionalism/aspirations-final.htm
[8] http://www.nmbar.org/Attorneys/creed.html
[9] http://www.okbar.org/ethics/standards.htm
[10] http://www.dcbar.org/for_lawyers/ethics/voluntary_standards_for_civility/judges.cfm; http://www.dcbar.org/for_lawyers/ethics/legal_ethics/voluntary_standards_for_civility/judgeother.cfm
[11] http://www.nycourts.gov/jipl/stndardsofcivility.pdf
[12] http://www.pacode.com/secure/data/204/chapter99/subchapDtoc.html
[13] http://wvodc.org/sopc.htm#judge
[14] http://www.njsba.com/resources/njcop/njcop-principle-praf.html
[15] http://supremecourtofohio.gov/publications/proIdeals.pdf
[16] http://www.wicourts.gov/sclrulhear/DisplayDocument.html?Content+html&seqNo=1047
[17] Thanks to Kent B. Scott for his research in gathering and examining the current judicial civility rules around the country as part of his service on the Utah Supreme Court's Advisory Committee on Professionalism, subcommittee on Proposed Standards of Judicial Civility and Professionalism.
[18] The Subcommittee consisted of Judge John Baxter, Donald J. Winder, Kent B. Scott, and John Sundloff.
[19] Rule 11-301 Utah Standards of Judicial Professionalism and Civility
[20] As noted in the Preamble to the Utah Standards, they are voluntary and aspirational.
[21] www.cba.org/cba/activities/pdf/codeofconduct.pdf. Canadian Bar Association Code of Conduct, Appendix: Principles of Civility for Advocates

THE FLORIDA BAR

RULE 4-8.2 JUDICIAL AND LEGAL OFFICIALS

(a) Impugning Qualifications and Integrity of Judges or Other Officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

(b) Candidates for Judicial Office; Code of Judicial Conduct Applies. A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Florida's Code of Judicial Conduct.

Comment

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

False statements or statements made with reckless disregard for truth or falsity concerning potential jurors, jurors serving in pending cases, or jurors who served in concluded cases undermine the impartiality of future jurors who may fear to execute their duty if their decisions are ridiculed. Lawyers may not make false statements or any statement made with the intent to ridicule or harass jurors.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

[Revised: 01/01/1993]

RULE 4-8.2 JUDICIAL AND LEGAL OFFICIALS

THE FLORIDA BAR

RULE 4-8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) Reporting Misconduct of Judges. A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) Confidences Preserved. This rule does not require disclosure of information:

(1) otherwise protected by rule 4-1.6;

(2) gained by a lawyer while serving as a mediator or mediation participant if the information is privileged or confidential under applicable law; or

(3) gained by a lawyer or judge while participating in an approved lawyers assistance program unless the lawyer's participation in an approved lawyers assistance program is part of a disciplinary sanction, in which case a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency.

(d) Limited Exception for LOMAS Counsel. A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member of The Florida Bar that raises a substantial question as to the other lawyer's fitness to practice, if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer's practice. Provided further, however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of rule 4-1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Generally, Florida statutes provide that information gained through a "mediation communication" is privileged and confidential.

including information which discloses professional misconduct occurring outside the mediation. However, professional misconduct occurring during the mediation is not privileged or confidential under Florida statutes.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of subdivisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

[Revised: 07/01/2012]

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Legal Groups and Law Schools
Judicial Nominating Commission

Research & Professionalism
Ethics Opinions
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THE FLORIDA BAR

RULE 4-8.4 MISCONDUCT
4 RULES OF PROFESSIONAL CONDUCT
4-8 MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:

(1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;

(2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;

(3) within the time stated in any subpoena issued under these Rules Regulating The Florida Bar (without additional time allowed for mailing);

(4) as provided in the Florida Rules of Civil Procedure or order of the referee in matters assigned to a referee; and

(5) as provided in the Florida Rules of Appellate Procedure or order of the Supreme Court of Florida for matters pending action by that court.

Except as stated otherwise herein or in the applicable rules, all times for response shall be calculated as provided elsewhere in these Rules Regulating The Florida Bar and may be extended or shortened by bar counsel or the disciplinary agency making the official inquiry upon good cause shown.

Failure to respond to an official inquiry with no good cause shown may be a matter of contempt and processed in accordance with rule 3-7.11(f) of these Rules Regulating The Florida Bar.

(h) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation; or

(i) engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.

If the sexual conduct commenced after the lawyer-client relationship was formed it shall be presumed that the sexual conduct exploits or adversely affects the interests of the client or the lawyer-client relationship. A lawyer may rebut this presumption by proving by a preponderance of the evidence that the sexual conduct did not exploit or adversely affect the interests of the client or the lawyer-client relationship.

The prohibition and presumption stated in this rule do not apply to a lawyer in the same firm as another lawyer representing the client if the lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the file concerning the legal representation.

Comment

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Subdivision (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, provided that the client is not used to indirectly violate the Rules of Professional Conduct.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of rule 4-1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.

Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity,

gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, or agent and officer, director, or manager of a corporation or other organization.

A lawyer's obligation to respond to an inquiry by a disciplinary agency is stated in subdivision (g) of this rule and subdivision (h)(2) of rule 3-7.6. While response is mandatory, the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of a certain matter. A response containing a proper invocation thereof is sufficient under the Rules Regulating The Florida Bar. This obligation is necessary to ensure the proper and efficient operation of the disciplinary system.

Subdivision (h) of this rule was added to make consistent the treatment of attorneys who fail to pay child support with the treatment of other professionals who fail to pay child support, in accordance with the provisions of section 61.13015, Florida Statutes. That section provides for the suspension or denial of a professional license due to delinquent child support payments after all other available remedies for the collection of child support have been exhausted. Likewise, subdivision (h) of this rule should not be used as the primary means for collecting child support, but should be used only after all other available remedies for the collection of child support have been exhausted. Before a grievance may be filed or a grievance procedure initiated under this subdivision, the court that entered the child support order must first make a finding of willful refusal to pay. The child support obligation at issue under this rule includes both domestic (Florida) and out-of-state (URESA) child support obligations, as well as arrearages.

Subdivision (i) proscribes exploitation of the client or the lawyer-client relationship by means of commencement of sexual conduct. The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. Attorneys have a duty to exercise independent professional judgment on behalf of clients. Engaging in sexual relationships with clients has the capacity to impair the exercise of that judgment.

Sexual conduct between a lawyer and client violates this rule, regardless of when the sexual conduct began when compared to the commencement of the lawyer-client relationship, if the sexual conduct exploits the lawyer-client relationship, negatively affects the client's interest, creates a conflict of interest between the lawyer and client, or negatively affects the exercise of the lawyer's independent professional judgment in representing the client.

Subdivision (i) creates a presumption that sexual conduct between a lawyer and client exploits or adversely affects the interests of the client or the lawyer-client relationship if the sexual conduct is entered into after the lawyer-client relationship begins. A lawyer charged with a violation of this rule may rebut this presumption by a preponderance of the evidence that the sexual conduct did not exploit the lawyer-client relationship, negatively affect the client's interest, create a conflict of interest between the lawyer and client, or negatively affect the exercise of the lawyer's independent professional judgment in representing the client.

For purposes of this rule, a "representative of a client" is an agent of the client who supervises, directs, or regularly consults with the organization's lawyer concerning a client matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

[Revised: 02/01/2010]

RULE 4-8.4 MISCONDUCT

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Courts and Judges
Legal Groups and Law Schools
Judicial Nominating Commission

Research & Professionalism
Ethics Opinions
Rules Regulating the Bar
Fastcase Legal Research
PRI - Practice Resource Institute
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Code of Judicial Conduct

Adopted September 29, 1994, effective January 1, 1995 (643 So. 2d 1037)
As amended through January 5, 2006 (SC05-281)

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1. A Judge Shall Uphold the Integrity and Independence of the Judiciary.
2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities.
3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.
4. A Judge is Encouraged to Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.
5. A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict with Judicial Duties.
    - A. Extrajudicial Activities in General.
    - B. Avocational Activities.
    - C. Governmental, Civic or Charitable Activities.
    - D. Financial Activities.
    - E. Fiduciary Activities.
    - F. Service as Arbitrator or Mediator.
    - G. Practice of Law.
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Application of the Code of Judicial Conduct
Effective Date of Compliance

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct establishes standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Definitions Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Definitions and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which, if proven, can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is not to be construed to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Definitions

"**Appropriate authority**" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported.

"**Candidate.**" A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, opens a campaign account as defined by Florida law, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to nonjudicial office.

"**Court personnel**" does not include the lawyers in a proceeding before a judge.

"**De minimis**" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

"**Economic interest**" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, sororal, or civic organization, or service by a judge's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

"**Fiduciary**" includes such relationships as personal representative, administrator, trustee, guardian, and attorney in fact.

"**Impartiality**" or "**impartial**" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

"Judge." When used herein this term means Article V, Florida Constitution judges and, where applicable, those persons performing judicial functions under the direction or supervision of an Article V judge.

"Knowingly," "knowledge," "known," or **"knows"** denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law" denotes court rules as well as statutes, constitutional provisions, and decisional law.

"Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship.

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

"Public election." This term includes primary and general elections; it includes partisan elections, nonpartisan elections, and retention elections.

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.

Amended January 5, 2006 (SC05-281).

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge should not hold membership in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation of this provision.

COMMENTARY

Canon 2A. Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3B(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

See also Commentary under Section 2C.

Canon 2B. Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business, although a judge may use judicial letterhead to write character reference letters when such letters are otherwise permitted under this Code.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 5D(5) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 7 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Canon 2C. Florida Canon 2C is derived from a recommendation by the American Bar Association and from the United States Senate Committee Resolution, 101st Congress, Second Session, as adopted by the United States Senate Judiciary Committee on August 2, 1990.

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n. Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

This Canon is not intended to prohibit membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as Boy Scouts, Girl Scouts, Boy's Clubs, and Girl's Clubs; and charitable organizations, such as United Way and Red Cross.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

Commentary amended January 5, 2006 (SC05-281).

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not, with respect to parties or classes of parties, cases, controversies or issues likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(11) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities.

(1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

(2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge.

(f) the judge, while a judge or candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(i) parties or classes of parties in the proceeding;

(ii) an issue in the proceeding; or

(iii) the controversy in the proceeding.

(2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification.

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Amended January 23, 2003 (838 So. 2d 521); January 5, 2006 (SC05-281).

COMMENTARY

Canon 3B(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

Canon 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3B(7). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief as amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Canon 3B(8). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

Canon 3B(9) and 3B(10). Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6 of the Rules Regulating the Florida Bar.

Canon 3B(10). Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Canon 3C(4). Appointees of a judge include assigned counsel, officials such as referees, commissioners, special magistrates, receivers, mediators, arbitrators, and guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4). See also Fla. Stat. Sec. 112.3135 (1991).

Canon 3D. Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency or body. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge having knowledge, however, that another judge has committed a violation of this Code that raises a substantial question as to that other judge's fitness for office or has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is required under this Canon to inform the appropriate authority. While worded differently, this Code provision has the identical purpose as the related Model Code provisions.

Canon 3E(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis. Similarly, if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that fact does not automatically require disqualification of the judge. Such disqualification should also be on a case-by-case basis.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Canon 3E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Canon 3E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

Canon 3E(1)(e). It is not uncommon for a judge's spouse or a person within the third degree of relationship to a judge to also serve as a judge in either the trial or appellate courts. However, where a judge exercises appellate authority over another judge, and that other judge is either a spouse or a relationship within the third degree, then this Code requires disqualification of the judge that is exercising appellate authority. This Code, under these circumstances, precludes the appellate judge from participating in the review of the spouse's or relation's case.

Canon 3F. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

Commentary amended June 15, 1995, effective Nov. 9, 1995 (656 So. 2d 926); Aug. 24, 1995 (659 So. 2d 692); January 23, 2003 (838 So. 2d 521); January 5, 2006 (SCO5-281).

CANON 4

A JUDGE IS ENCOURAGED TO ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A. A judge shall conduct all of the judge's quasi-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

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SURVIVAL OF THE SMALL COMPANY: A PRACTICAL GUIDE TO PILLAR 3 COMPLIANCE - ETHICAL CONSIDERATIONS FOR PROTECTING NON-PUBLIC PRIVATE INFORMATION

Christopher Gulotta Esq., Founder & CEO, Real Estate Data Shield, Inc. and The Gulotta Law Group, PLLC
Matthew Froning, MBA, Chief Information Officer of Security Compliance Associates

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SPEAKER INFORMATION

SURVIVAL OF THE SMALL COMPANY: A PRACTICAL GUIDE TO PILLAR 3 COMPLIANCE - ETHICAL CONSIDERATIONS FOR PROTECTING NON-PUBLIC PRIVATE INFORMATION

Christopher J. Gulotta, Esq.
Founder & CEO, Real Estate Data Shield, Inc. and The Gulotta Law Group, PLLC

Mr. Gulotta is the founder of The Gulotta Law Group, PLLC and Real Estate Data Shield ("REDS") and was one of the very first to speak to our industry on the importance of Compliance in connection with Lender Liability for their Service Providers and Information Security. Chris possesses a truly unique combination of sophistication in Lender and Service Provider oversight regulations, Industry Best Practices and information security compliance obstacles and solutions.

Chris has represented the leading institutional lenders in mortgage finance transactions for over 20 years and has been a thought leader in addressing the most essential needs of lenders (from operations to compliance). His law firm focuses exclusively on representing such lenders and has proudly served as a Preferred Vendor to some of the leading institutional lenders;

Christopher is a member of ALTA's Best Practices Task Force & Technology Committee, working with industry leaders to develop timely and prospective regulatory solutions for title & settlement agents as a member of both "Lender" and "Settlement Agent" workgroups;

REDS, recently named ALTA's Inaugural Best Practices *Elite Provider*, is the first industry-specific company to provide title & settlement companies with Security Compliance tools through its Compliance Management Platform that provides our industry with: (i) Security Policy templates; (ii) award-winning staff training courseware; and (iii) security-assessment compliance tools;

Seven (7) national title underwriters have named REDS as their *Preferred Vendor* for Data Security Compliance.

Chris is a graduate of Fordham Law School. Prior to forming The Gulotta Law Group, Chris clerked at Finley Kumble et al., and thereafter was an associate at leading New York real estate law firms (Baer Marks & Upham, and Sonnenschein Sherman & Deutsch). He has served as a Continuing Legal Education faculty member at Fordham Law School, Pace Law School, The Association of the Bar of the City of New York and the New York State Bar Association. He has been a featured columnist for and interviewed for articles in: *The New York Law Journal, The National Law Journal, The Title Report; The Legal Description; Valuation Review, TitleNews* etc., on topics including: Service Provider Compliance; Lender Oversight; information security compliance for title and settlement agents; privacy law; title escrow funds; RESPA reform; new media and Internet law.

Back to Speaker Topics

Matthew H. Froning, MBA

Chief Information Officer of Security Compliance Associates

Matthew H. Froning designed and developed a proprietary ALTA Pillar 3 Information Security Assessment Process, Guideline, and Report that outlines the requirements of ALTA compliance, the areas of strength within an organization, and the shortfalls an organization must remediate in order to become compliant. An established public speaker, he was invited and spoke at 15 different underwriter, state land title association, NS3, and ALTA events, to include national conventions and webinars, over the last year for audiences ranging from 30 to over 300 people in attendance. While with SCA, Mr. Froning has led the execution of over 350 security assessments, to include nearly 100 ALTA Best Practice assessments for the Title & Settlement agents and attorneys.

Having spent over 21 years supporting the United States Air Force and the Federal Government, as both an active duty member and federal contractor, he led technical assessments, evaluations and integration of multiple complex Network Warfare products, identifying shortfalls, gaps and capabilities critical to the Air Force's network operation mission. After active duty, Mr. Froning was the Regional Manager, Cyber Operations Division for ManTech International Corporation, where he led the daily operations of a nearly $8 million government contract, while also conducting vulnerability assessments for several Fortune 500 corporations & providing critical information on vulnerabilities and solutions to ensure the integrity and security of their networks.

A former commissioned officer in the United States Air Force, Mr. Froning was a Federal Agent and the Chief of Computer Investigations & Operations for the Air Force Office of Special Investigations where he was responsible for investigating, managing and directing the investigation of computer related criminal, counterintelligence, counterespionage, fraud and undercover matters. He is well versed in providing consultation and expert advice to attorneys, law enforcement officers and IT professionals. SCA is fortunate to have Mr. Froning as a team member. His specialized skill sets provide unique and difficult to achieve knowledge for SCA clients.

FUND ASSEMBLY
MAY 5-7 2016

2016 Fund Assembly

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FUND ASSEMBLY
MAY 5-7 2016

52nd Annual Fund Assembly
"Data Security Compliance, from Laws & Regulations to Implementation"

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Terminology & NPPI Defined

- **Non-public Personal Information ("NPPI"):**
  - Personally identifiable data such as information provided by a customer on a form or application, information about a customer's transactions, or any other information about a customer which is otherwise unavailable to the general public.
  - NPPI includes first name or first initial and last name coupled with any of the following:
    - Social Security Number
    - Driver's license number
    - State-issued ID number
    - Credit or debit card number
    - Other financial account numbers

The Assets to be Protected

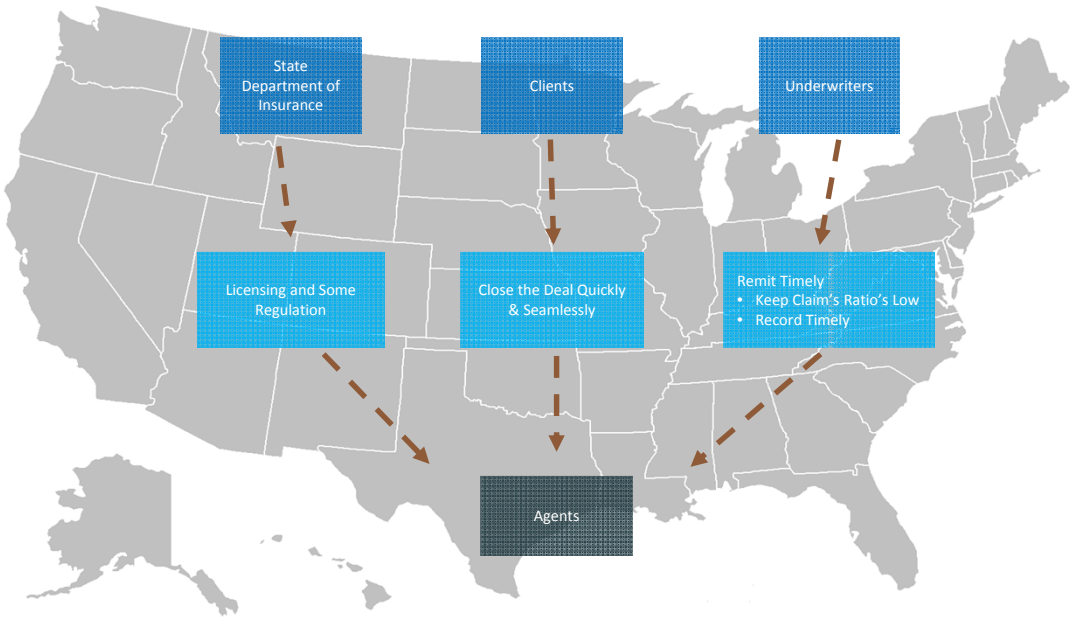
Common "Settlement" Documents Containing NPPI	Common "Title" Documents Containing NPPI
Uniform Residential Loan Application (Form 1003) (NPPI includes: SSN, bank account numbers, loan numbers, work addresses, etc.)	Identification (Driver's License, passport, etc.) (NPPI includes: address, Birthdate, ID number, Passport number)
Borrower Tax Returns (NPPI includes: SSN, financial information, address)	Title Order form (NPPI includes: SSN, address, loan number)
Lender Engagement Letter (NPPI includes: SSN, address, loan numbers)	Payoff Letter (NPPI includes: Bank account numbers, loan number, address)
Identification (Driver's License, passport, etc.) (NPPI includes: address, birthdate, ID number, Passport number)	Escrow Agreements with Tax Searches (NPPI includes: SSN, address)
Settlement Statement (CFPB Closing Disclosure) (NPPI includes: loan number, address)	Real Estate Transfer Tax Forms (NPPI includes: SSN, financial information,
IRS Form 4506-T, Request for Transcript of Tax Returns (NPPI includes: SSN, address)	Affidavits (NPPI includes: SSN, address)
IRS Form W-9, Request for Taxpayer Identification Number and Certification (NPPI includes: SSN, address)	Recordable Docs (NPPI includes: loan numbers, address)
Payoff Letter (NPPI includes: Bank account numbers, loan number, address)	Title Bill (NPPI includes: address)

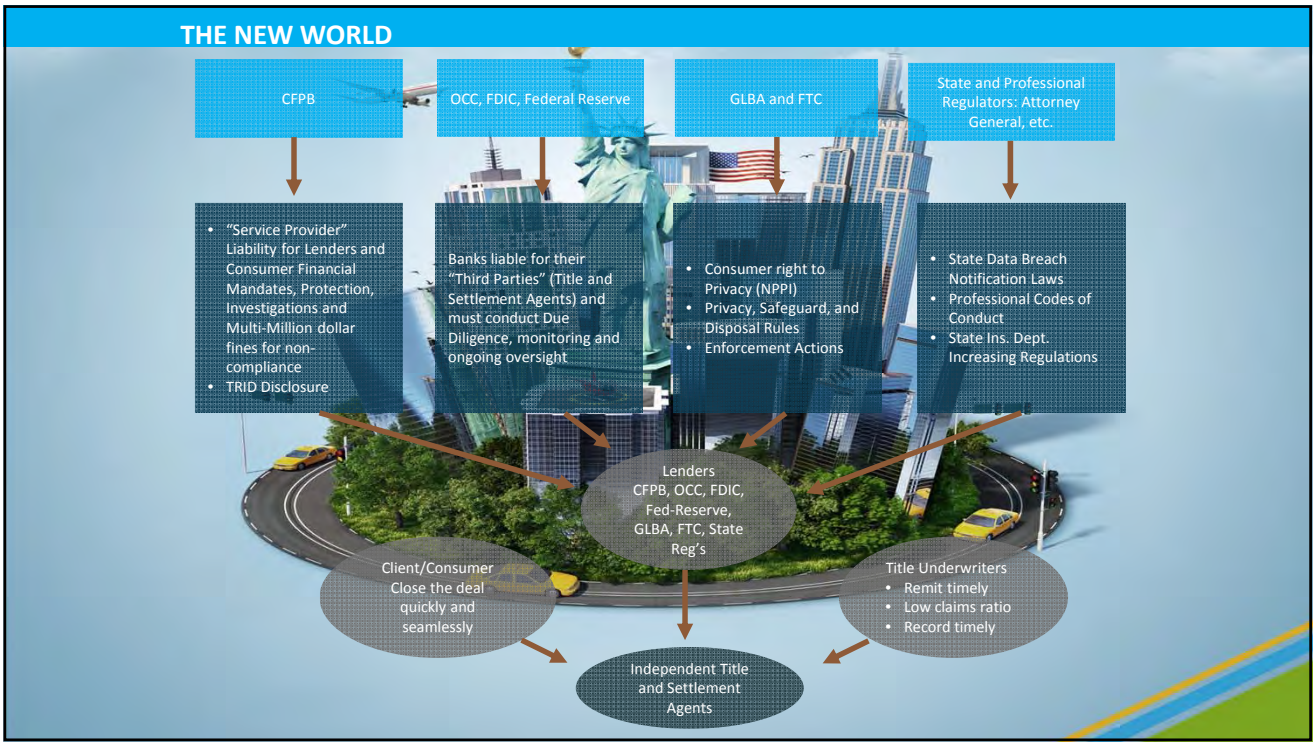
Relevant Sources

FUND ASSEMBLY
MAY 5-7 2016

- Gramm-Leach Bliley Act (GLBA)
- Federal Trade Commission (FTC)
  - Privacy Rule (1999)
  - Safeguard Rule (2003)
  - Disposal Rule (2005)
- Consumer Financial Protection Bureau (CFPB)
  - April 2012 Bulletin
  - Supervisory Highlights (2012)
- Office of the Comptroller of the Currency (OCC)
  - Interagency Guidelines Establishing Standards for Safeguarding Customer Information (2001)
  - Third Party Relationship Bulletin (Oct. 2013)
- Federal Reserve System
  - December 5, 2013 "Managing Outsourcing Risk" Bulletin
- American Land Title Association (ALTA)
  - "Best Practices" for Title Insurance and Settlement Companies Version 2.0 (Jan 2013)
- State Agencies & Regulators (State Attorney General, Department of Insurance, Attorney Professional Codes of Conduct)
- Lender mandates

THE OLD WORLD





Gramm-Leach Bliley Act (GLBA)

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- Date Enacted: November 12th, 1999
- Date Effective: November 18th, 2000
- Compliance date: July 1st, 2001

- Tasks the FTC and other agencies that regulate Financial Institutes to implement regulations to carry out GLB's financial privacy provisions.

- Covers "financial institutions"
  - Real Estate Settlement Service Providers (e.g., Title and Settlement companies) included in definition of "financial institutions" as they are "significantly engaged" in financial activities.

Federal Trade Commission RULES:

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MAY 5-7 2016

1999 – FTC Privacy Rule (16 C.F.R. § 313)

Financial Institutions are required to provide "**a clear and conspicuous notice**" (i.e. a "Privacy Notice") to customers/consumers that accurately states the company's privacy policies and practices

2002 – FTC Safeguards Rule (16 C.F.R. § 314)

Financial Institutions are required to develop a **written information security plan** that describes their program to protect customer/consumer information

Preamble to Rule identifies "**employee training and management**" as one of the three areas essential to ensuring information security within a business

2005 – FTC Disposal Rule (16 C.F.R. § 682)

Financial Institutions are required to properly dispose of all customer/consumer information by taking **"reasonable measures"** to protect against unauthorized access to/use of the information

Reasonable measures = burning/pulverizing/shredding papers so that the information cannot be read or reconstructed; destroying or erasing electronic media

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FTC Safeguards Rule 16 CFR Part 314 (cont.)

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- Must:
  - Designate employee to coordinate information security program
  - Identify and assess risks to customer information and evaluate effectiveness of current safeguards
  - Design and implement a safeguards program and regularly monitor/test it
  - Select service providers to maintain safeguards and oversee handling of customer information
  - Evaluate and adjust the program in light of relevant circumstances

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FTC Safeguards Rule 16 CFR Part 314 (cont.)

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- FTC recommendations include:
  - Employee management and training for information handling;
  - "Regular" Risk assessment of systems, networks, and software designs;
  - "Periodic" monitoring and testing of safeguards (e.g. penetration testing of network access);
  - Upgrade information security program when necessary;
  - Checking references or conducting background checks before hiring new employees;
  - Require employee to read and sign company privacy policies;

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FTC Disposal Rule (June 2005)

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- **16 C.F.R. § 682**: Any person who maintains or otherwise possesses consumer information for a business purpose must properly dispose of such information by taking **reasonable measures** to protect against unauthorized access to or use of the information in connection with its disposal.
- Examples of "reasonable measures" include:
  - Burning, pulverizing, or shredding papers containing consumer information so that the information cannot practicably be read or reconstructed
  - Destroying or erasing electronic media containing consumer information so that the information cannot practicably be read or reconstructed

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Federal Trade Commission v. Nations Title Agency, Inc.

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- In 2004 a hacker used a common website attack to obtain unauthorized access to Nations Title's computer network.
- In 2005, a Kansas City television station found documents containing NPPI in an unsecured dumpster.
- Title company disposed of confidential customer information in a unsecured dumpster and hackers exploited security flaws in the company's network
- FTC reinforces its position that Title companies are "Financial institutions" and fall under the GLB Act, thus they are subject to GLB & FTC consumer privacy obligations.

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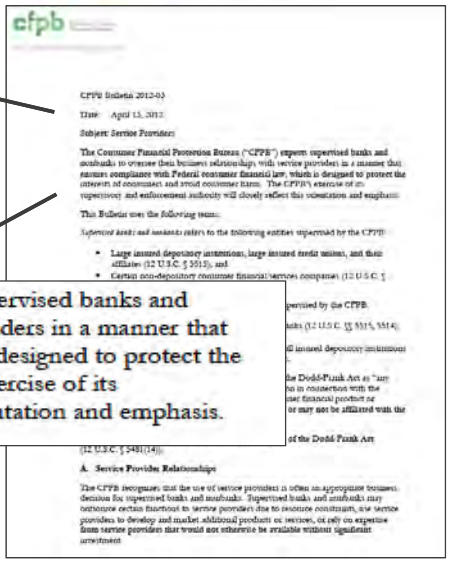
MAY 5-7 2016

CFPB Bulletin 2012-03

Date: April 13, 2012

Subject: Service Providers

The Consumer Financial Protection Bureau ("CFPB") expects supervised banks and nonbanks to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer financial law, which is designed to protect the interests of consumers and avoid consumer harm. The CFPB's exercise of its supervisory and enforcement authority will closely reflect this orientation and emphasis.



CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of **Dwolla, Inc.**

FUND ASSEMBLY MAY 5-7 2016

In particular, Dwolla failed to:

- Adopt and implement data-security policies and procedures reasonable and appropriate for the organization;
- Use appropriate measures to identify reasonably foreseeable security risks;
- Ensure that employees who have access to or handle consumer information received adequate training and guidance about security risks;
- Use encryption technologies to properly safeguard sensitive consumer information; and
- Practice secure software development, particularly with regard to consumer-facing applications developed at an affiliated website, Dwolla labs.
- Respondent also failed to conduct adequate, regular risk assessments to identify reasonably foreseeable internal and external risks to consumers' personal information, or to assess the safeguards in place to control those risks.
- Respondent conducted its first comprehensive risk assessment in mid-2014.

DWOLLA

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CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of **Dwolla, Inc.**

FUND ASSEMBLY MAY 5-7 2016

Employee Training

- Until at least December 2012, Respondent's employees received little to no data security training on their responsibilities for handling and protecting the security of consumers' personal information.
- Respondent did not hold its first mandatory employee training on data security until mid-2014.
- In December 2012, Respondent hired a third party auditor to perform the first penetration test of Dwolla.com. In that test, a phishing e-mail attack was distributed to Respondent's employees that contained a suspicious URL link.
- Nearly half of Respondent's employees opened the e-mail, and of those, 62% of employees clicked on the URL link. Of those that clicked the link, 25% of employees further attempted to register on the phishing site and provided a username and password.
- Dwolla failed to address the results of this test or educate its personnel about the dangers of phishing.
- Dwolla did not conduct its first mandatory employee data-security training until mid-2014

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CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of **Dwolla, Inc.**

FUND ASSEMBLY
MAY 5-7 2016

IT IS ORDERED that:

63. Under section 1055(c) of the CFPA, 12 U.S.C. §5565(c), by reason of the violations of law described in Section IV of this Consent Order, and taking into account the factors in 12 U.S.C. § 5565(c)(3), **Respondent must pay a civil money penalty of $100,000 to the Bureau.**

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MAY 5-7 2016

OCC Bulletin OCC 2013-29

October 30, 2013

"Third Party Relationships" Bulletin

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2013 OCC Third Party Relationships Bulletin

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MAY 5-7 2016

- In the new 2013 OCC Third Party Relationship Bulletin, the OCC speaks of "lessons learned" over the 12 years since the publication of their 2001 OCC Third Party Relationship Bulletin.
- Those "lessons" include:
- (i) The increased use of outsourced service providers;
- (ii) The increased complexity of the vendor relationship; and
- (iii) The increased use of technology and the increased inter-connectedness of third-party providers and banks.

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2013 OCC Third Party Relationships Bulletin

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- These factors have combined to create a higher level of "**safety & soundness**" risk and the **OCC has concern that banks may have generally failed to:**
-
- Properly assess the risks associated with the use of such third party providers;
- Perform adequate **due diligence** and on-going monitoring of these relationships; and
- Appropriately enter into **agreements** with Service Providers after properly **assessing** the third party's internal risk management capabilities.

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Federal Reserve
"Guidance on Managing Outsourcing Risk"
Bulletin SR 13-19

FUND ASSEMBLY
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This Bulletin represents the third regulator bulletin in less than two years cautioning lenders about the risk and responsibilities associated with using "Service Providers"

Risk From Use of Service Providers:
- If not managed effectively, the use of Service Providers may expose financial institutions to risks that can result in regulatory action, financial loss, litigation, and loss of reputation.

Service Providers Risk Management Programs:
- A financial institution's Service Provider risk management program should be risk-focused and provide oversight and controls **commensurate with the level of risk presented** by the outsourcing arrangements in which the financial institution is engaged.

Risk Assessment:
- A financial institution should conduct an evaluation of and perform the necessary due diligence for a prospective Service Provider prior to engaging the Service Provider.

Operations and Internal Controls:
- Financial institutions are **responsible for ensuring** that services provided by Service Providers comply with applicable laws and regulations and are consistent with **safe-and-sound** banking practices.

Confidentiality and Security of Information:
- Service Providers should ensure the security and confidentiality of both the financial institution's confidential information and the financial institution's customer information.
- Information security measures for outsourced functions should be viewed as if the activity were being performed by the financial institution and afforded the same protections.
- Service agreements should also address service provider use of financial institution information and its customer information.

Title Insurance and Settlement Company "Best Practices"

FUND ASSEMBLY
MAY 5-7 2016

Mission Statement

- ALTA seeks to guide its membership on best practices **to protect consumers, promote quality service, provide for ongoing employee training, and meet legal and market requirements.**
- These practices are designed to ensure a positive and compliant real estate settlement experience.
- ALTA is publishing these best practices as a benchmark for the mortgage lending and real estate settlement industry.

Title Insurance and Settlement Company Best Practices

Wednesday, January 2, 2013

AMERICAN LAND TITLE ASSOCIATION

Best Practice Pillar #3

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- **Best Practice**: **Adopt and maintain a written privacy and information security program to protect Non-public Personal Information as required by local, state and federal law.**

- **Purpose**: Federal and state laws (including the Gramm-Leach-Bliley Act) require title companies to develop a written information security program that describes their procedures to protect non-public customer information.
  - The program must be appropriate to the company's size and complexity, the nature and scope of the company's activities, and the sensitivity of the customer information the company handles
  - The company must evaluate and adjust its program in light of relevant circumstances, including changes in the company's business or operations, or the results of security testing and monitoring

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ALTA –Assessment Procedures

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MAY 5-7 2016

- ✓Written Plan
- ✓Trained Employees
- ✓Risk Assessment
- ✓Independent Testing of Key Controls
- ✓Acceptable Use Acknowledgements
- ✓Access Controls for NPPI
- ✓Network Access Controls w/Background Checks
- ✓Removable Media Controls
- ✓NPPI encryption in motion and at rest
- ✓Monitor, detect & respond to attacks
- ✓Physical controls to protect premises & NPPI
- ✓Change/Modification & Back-up controls
- ✓Privacy Disclosures
- ✓Records Retention & Destruction

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Employee Training

FUND ASSEMBLY
MAY 5-7 2016

- **Purpose**
  - Approximately 39% of all data breaches are caused by negligent employees or contractors, and comprehensive training is the most effective way to reduce this negligence.
- **Benefits**
  - The success of a company's information security plan "depends largely on the employees who implement it." To kick start this success, the **FTC** recommends training employees "to take basic steps to maintain the security, confidentiality, and integrity of customer information."
- **Expectations**
  - In addition to ALTA and FTC expectations, the **CFPB and OCC** have emphasized in Bulletins and administrative proceedings that companies must provide for an effective training and compliance management program for all employees and service providers.

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Local Laws and Rules of Professional Conduct for Attorneys

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- Nearly every state have adopted the American Bar Associations Model Rules of Professional conduct.
- Rule 1.6 Confidentiality of information
  - (a) "a lawyer shall not reveal information relating to the representation of a client.."

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American Bar Association & Common Law

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- It is now commonly accepted in the legal profession that the confidentiality duty applies to attorney client information in computer and information systems.

- Comment 18 to ABA Model Code: notes that lawyers are required "to ***act competently to safeguard information relating to the representation of a client*** against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."

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FLORIDA CODE OF PROFESSIONAL CONDUCT
Florida adopted the ABA Model Rules of Professional Conduct on July 17, 1986.

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RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information.

A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

FL Rule 4-1.6 of the Rules Regulating the Florida Bar imposes a duty to maintain confidentiality of client information, and imposes upon attorneys a "correlative duty to refrain from inducing others to disclose confidential matters."

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Section 60 Restatement (Third) of Law Governing Lawyers

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§60: A Lawyer's Duty to Safeguard Confidential Information

(1) During and after representation of a client:

(a) the lawyer may not use or disclose confidential client information as defined in § 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information;

(b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.

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Section 60 Restatement (Third) of Law Governing Lawyers (cont.)

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- Comment D: *A lawyer's duty to safeguard confidential client information*
  - "A lawyer who acquires confidential client information has a **duty to take reasonable steps to secure the information against misuse or inappropriate disclosure**, both by the lawyer and by the lawyer's associates or agents to whom the lawyer may permissibly divulge it."
  - "**This requires that client confidential information be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality**."
  - "A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information."
  - "**That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties**."

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Florida's New Data Breach Law

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- The Florida Information Protection Act of 2014 (FIPA)
- Enacted February 28, 2014
- Effective July 1, 2014
- "The FIPA overhaul makes this new law stringent and encompassing – even said to be one of the nation's most strict breach notification laws." (BrightLine)

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Overview of Major Changes

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- New, broader obligation to report data security incidents;
- Now, "commercial entities" must also report incidents that have not or are unlikely to produce harm by written email notice to Florida Department of Legal Affairs within 30 days;
- Mandatory reporting to Florida Department of Legal Affairs (FDLA) when breach affecting more than 500 customers occurs;
- Expanded Definition of PII:
  - In addition to Gramm-Leach-Bliley Act criteria, now the following additional requirements qualify as personal information to safeguard:
    - Information regarding an individual's health or medical history;
    - Any unique identifiers used by health insurance providers;
    - ***Any other information about that person that could be used to personally identify that person;***
    - A user name or email address, in conjunction with a password or security question and answer that would permit access to an ***online account.***

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Overview of Major Changes (cont.)

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- Breach notifications must go out within 30 days instead of 45 days;
- **All covered entities** must take reasonable measures to protect and secure data (effectively mandating a "safeguard standard");
  - Covered entities include any commercial entity
- Customer records containing PII must be destroyed;
- New obligation to report incident that has not or is unlikely to result in harm; and
- New mandatory reporting to Department of Legal Affairs when 500 or more Florida residents affected by data breach.

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FIPA New Data Security Requirement

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- ***FIPA adds a requirement that covered entities take "reasonable measures" to protect and secure data in electronic form containing personal information and to prevent breaches of security [501.171 § (2)]***
  - Examples of reasonable measures include encrypting data or de-identifying the data
- "Covered entity" means ***any commercial entity*** that "acquires, stores, maintains, or uses personal information" [501.171 § (1)(b)]

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FIPA: New Requirements for Disposal of Customer Records, No Private Cause of Action

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- ***Customer records includes both paper and electronic records***
- ***FIPA requires taking reasonable measures to dispose of customer records that contain personal information when they "are no longer to be retained"***
- ***Required action includes shredding, erasing, or making the personal information unreadable or undecipherable [501.171 § (8)]***

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Violation/Fines

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- A violation of FIPA treated as deceptive trade practice, enforceable by the FDLA (located in the AG's office)
  - Fines run up to $500,000, $1,000 for each day a breach goes unreported to customers/FDLA, and $50,000 for each month the breach goes unreported [501.171 § (9)]
  - No private cause of action under FIPA [501.171 § (10)]

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Lender Requirements Regarding ALTA Best Practices

Lender Name	Date of Statement	BP Statement
Wells Fargo	July 1, 2013	***2013 National Settlement Services Summit, Penny Reed*** : "ALTA's Best Practices and underwriter audits are a good step" [in reducing lender liability]
	March 6, 2014	***Wells Fargo Newsletter*** : ALTA's Best Practices "are designed to help illustrate to consumers and clients the industry's professionalism and best practices to help ensure a positive and compliant real estate settlement experience. Wells Fargo supports ALTA's Best Practices, and considers them to be guidelines for sound business practices that should ideally be already in place for businesses providing title and closing services to our customers."
SunTrust Bank	January 2015	***SunTrust letter to settlement providers*** : "ALL candidates for approval [as an approved closing attorney or settlement agent] will be required to provide a ALTA best practices self-evaluation."
	April 22, 2015	***SunTrust letter to settlement providers:*** "SunTrust believes that the most efficient and comprehensive way to comply with this guidance is to require our approved settlement agents to adhere to ALTA's Best Practices. In order to remain eligible to close loans for SunTrust, all settlement service providers are required to complete an ALTA Best Practice's Self-Assessment no later than July 1, 2015."
	June 30, 2015	***SunTrust Title & Settlement Approval Form:*** form that title insurance and settlement providers complete and submit to SunTrust. No mention of Best Practices on this form

Lender Requirements Regarding ALTA Best Practices

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Bancorp South	March 2, 2015	***Bancorp South letter to settlement providers*** : "After careful deliberation, BancorpSouth now requires all of our approved closing agents to adhere to the ALTA Best Practices 2.0.... Your adherence to the ALTA Best Practices must be verified by an independent third party vendor acceptable to us, and self-certification is not acceptable." Requested that all certifications be completed no later than July 31, 2015.
	May 29, 2015	***Bancorp South letter to settlement providers:*** Further guidance from Bancorp about the type of third party engagements that would be acceptable. "BancorpSouth has determined that both an examination review and a procedural engagement [set forth by AICPA standards] will be an acceptable form of certification." Requested that all certifications be completed no later than July 31, 2015.
Trustmark	June 1, 2015	***Trustmark letter to closing agents/attorneys:*** "In order for Trustmark to meet both regulatory and investor requirements, we now feel it necessary to require closing agents/attorneys to be ALTA certified... You will need to be certified by an independent third party acceptable to us." Requested that all certifications be completed no later than January 1, 2016, but that in the interim, closing agents/attorneys must be fully capable of being in compliance with TRID by July 31, 2015.
IBERIABANK Mortgage Company	June 1, 2015	***IBERIABANK letter to approved closing attorneys, closing agents, and title companies:*** "IBERIABANK Mortgage Company now requires all our approved Closing Attorneys, Closing Agents, and Title Companies to adhere to ALTA Best Practices 2.0... Your adherence to ALTA Best Practices must be verified by an independent third party. *IBERIABANK Mortgage Company will not accept self-certifications ...* ALTA Best Practices Certifications must be completed by 8/1/2015."

Lender Requirements Regarding ALTA Best Practices

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American Bank & Trust	July 17, 2015	***American Bank & Trust letter to approved closing attorneys: "On or before October 2, 2015, all aproved attorneys will be required to provide a letter of intent to comply with the Consumer Financial Protection Bureau's TILA-RESPA Integrated Disclosure (TRID) rules, including proof of certification of compliance from an independent third part of ALTA Best Practices ..."***
Gulf Coast Bank & Trust Company	August 7, 2015	***Gulf Coast Bank & Trust Company letter to approved closing attorneys and title companies:*** "At the guidance of the CFPB, we are now required to validate your adherence to the ALTA Best Practices 2.0. ... we are asking that you provide an ALTA Best Practices 2.0 Certification, by an independent third party. In order to continue closing loans for Gulf Coast Bank and Trust Company, we request your response by August 31, 2015." Certifications must be completed by September 15, 2015.

ALTA Best Practices: www.alta.org/bestpractices

American Land Title Association
Protecting the American Dream Since 1907

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Beginning the Compliance Process

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Practical Steps to Take:

☑Develop all required privacy and data security policies, procedures, and plans
- ☑Information Security Plan
- ☑Incident Response Plan
- ☑Disaster Recovery Plan
- ☑Secure Password Policy
- ☑Electronic Communications and Internet Use Policy

☑Assess your company's risk profile
☑Educate and train your work force
☑Secure your work flows
☑Ensure compliance of all service providers
☑Implement a sound document destruction policy

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Critical Security Controls

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- Administrative
- Physical
- Network

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Administrative Security Critical Controls

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- Staff Training
- Manual of Policies and Procedures
- Privacy Notice
- Shred-All Policy
- Sub-vendor Non-Disclosure Agreements (NDA's)
- Background checks on employees handling NPPI
- Clean Desk, Office and Screen Policy
- Authorized Devices

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Physical Security Critical Controls

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- Entryway Security & Sign-in Log
- Clean Desk Policy
- Clean Office
- Locked Filing Cabinets
- Security Cameras
- Privacy Screens
- Locked Offices
- Shredding of Paper and Digital Media
- Locks on Computers

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Network Security Critical Controls

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- Password Protection
- Computer Screen Timed Lockout
- Using Various Brands of Firewalls (Defensive Depth)
- Port Lockdown
- Network Printers/Scanners
- Restrictive Access to Programs, files etc.
- Updates and Patches
- Email Encryption

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Data Security/Best Practices Preparation and Implementation

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MAY 5-7 2016

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Assessment Process

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- Phase 1 – Initial Call
- Phase 2 – Pre-Assessment Due Diligence
- Phase 3 – External Assessment
- Phase 4 – Internal Assessment
- Phase 5 – Post-Assessment Report
- Phase 6 - Remediation

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Phase 1 – Initial Call

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- Provide the client with expectations on the process
- List of some of the items the engineer will need, such as:
  - Information Security Policy
  - Acceptable Use Policy
  - Business Continuity/Disaster Recovery Plan
- Explain the personnel interview process & who will be interviewed
- Answer any other questions the client may have about the on-site assessment

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Phase 2 – Pre-Assessment Due Diligence

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- Prior to the engineer coming on-site, you should:
- Review policies & procedures
  - Up-to-date & Contain necessary information
- Review network topology
  - Security devices configured to be effective
- Antivirus Updates
- Check Web Content Filtering
- Server configurations
  - Ensure Firewalls & IDS/IPS properly configured
- User management
  - Remove old user accounts
  - Rename default administrative account names

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Phase 3 – External Assessment

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- External Vulnerability Assessment / Penetration Testing:
  - Test IDS/IPS vendor response
  - Test target IP addresses for vulnerabilities and create Proof Of Concepts (POC) for vulnerabilities found
- Social Engineering to test employee awareness and IS training effectiveness:
  - Spear Phishing emails
  - Phishing email containing a forged link
  - Pre-text calling – similar to phishing, the intention is to obtain sensitive information via telephone

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Phase 4 – On-Site Assessment

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Once we arrive on-site, we will begin the assessment process by:

- Conducting an external physical assessment of the site
- Internal physical assessment
- Conducting an internal network vulnerability scan
- Conduct interviews with management & IT staff
- Review in-place policies & procedures
- Workstation reviews
- Server configuration reviews

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Phase 5 – Post Assessment Report

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The post audit reports includes, but is not limited to:

- **Detailed findings of all parts of the assessment**
- **List of vulnerabilities discovered and the associated hosts**
- **Recommendations for:**
  - **Vulnerability remediation**
  - **Policy recommendations**
  - **Acceptable use recommendations**
  - **Implementation of Business Continuity/Disaster Recovery Plan**

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Phase 5 – Post Assessment Report

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Change Management – Internal Assessment

Risk Level: Medium

Description: An appropriate change management program should be implemented in order to track and monitor all changes. Effective communication of planned changes and the ability to test and restore changes before deployment to production is very critical to the success of the security program.

Results: CLIENT does not have a formal change management program that addresses software and hardware upgrades/patches, vendor releases, installation of new clients and servers, establishing new networks and subnets, migrating and installing new operating systems, and authorization.

The IT support staff has privileges to make system and software changes. The IT staff handles the installs of all software. However, general users do possess the ability to download and run executable files. No compatibility or security testing is conducted on any new software prior to deployment onto operational system/network.

Recommendation: SCA recommends that CLIENT implement a formal change management program. As part of this program, it is recommended that all new proposed software changes be tested outside of operational environment to ensure the integrity of the operational network and services. Also, SCA recommends that CLIENT restrict the privileges of users so that general users do not have the privileges to download and run executable files on workstations and/or the CLIENT network.

In order to effectively manage the licensing of vendor software, SCA recommends that CLIENT acquire or develop a program that tracks the licensing information of all licensed software used by CLIENT and informs the appropriate personnel when licenses are set to expire and need to be renewed.

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Phase 6 – Remediation

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Review findings, then:

- Determine ability to remediate shortfalls & vulnerabilities
- Work with IT support on remediation steps for technical vulnerabilities
- Remediate non-technical shortfalls/vulnerabilities
- Document remediation steps performed

- Use ISO on-demand availability to answer questions you may have and provide guidance
  - It's a resource for you – Take advantage of it!

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Common Mistakes / Weaknesses

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- Antivirus
  - Disabling antivirus active scan due to speed issues
  - No antivirus on the server because it is not accessed
- No firewall
- Not monitoring firewalls, IPS/IDS, and event logs
- Allowing anyone to access files on file servers (Not using permissions)
- Allowing anyone on the internal network through the wireless access point
- Employees providing username/password
- No backup plan or Disaster Recovery Policy

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Disclaimer

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- **This presentation, the supporting materials and the information contained therein do not constitute legal advice nor an attorney client relationship and is provided for information purposes only. Because laws, rules and regulations change frequently and because local laws may apply, you should consult an attorney for any specific compliance or related inquiries.**

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FUND ASSEMBLY 2016

DEMYSTIFYING THE TITLE POLICY-COVERAGE & EXCLUSIONS

Liron "Lee" Offir, Fund Underwriting Counsel

Back to Speaker Topics

SPEAKER INFORMATION

DEMYSTIFYING THE TITLE POLICY-COVERAGE & EXCLUSIONS

Liron "Lee" Offir
Fund Underwriting Counsel

Liron "Lee" Offir has been practicing law since 2006 and is Board Certified in Real Estate. Prior to joining The Fund, he was in private practice handling transactional matters, litigation, and trial work. He has earned his J.D. from Stetson University College of Law in St. Petersburg, FL , and his B.S.B.A. at the University of Central Florida. In addition to tending to his practice, Lee has conducted presentations and lectures with regard to business, law, real estate, networking, trend forecasting, as well as other areas for various groups and organizations throughout South Florida.

Lee has been named a Super Lawyer Rising Star every year for the past 6 years. Lee is very active within his community, and is involved in leadership, community service, and freemasonry. He sits on the Board of Directors for various charitable organizations, as well as the Chairman of the Small Business Advisory Board for the City of Sunrise. Lee is dedicated to the practice of law as well as his family. He and his wife, Jessica, are enjoying raising their fun and rambunctious toddler, Jacob. In his free time, Lee can be found with his family and friends, enjoying all that South Florida has to offer.

Back to Speaker Topics

Explaining Policy Coverage for the Largest Single Expense Most People Will Incur

By: Lee Offir
Fund Underwriting Counsel

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Introduction

In 2011, the Florida Department of Insurance Regulation (OIR) gave final approval for Old Republic to issue the 2006 American Land Title Association (ALTA) Forms for Title Insurance. These revised Forms include Policy Jackets, Schedules, and Endorsements for the 2006 ALTA Commitment, 2006 ALTA Loan Policy, 2006 ALTA Owner's Policy, and 2006 Short Form Loan Policy. In conjunction with the approval, OIR required the official 2006 ALTA Forms be modified to remove affirmative or prospective coverages. For discussion and presentation purposes, the resulting 2006 ALTA Forms (with Florida Modifications) are referred to herein.

Policy Coverage Defined

COVERED RISKS SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, a Minnesota corporation (the "Company") insures, as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

What is being covered?

1. *Covered Title Defects.*
2. *Causing a loss to the insured.*
3. *Subject to conditions, exclusions, and exceptions.*

Covered Risks Common to Both Owner's and Loan Policies

Vesting of Title

1. Title being vested other than as stated in Schedule A.

Defects in Title

2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from

a. A defect in the Title caused by

i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;

ii. failure of any person or Entity to have authorized a transfer or conveyance;

iii. a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;

iv. failure to perform those acts necessary to create a document by electronic means authorized by law;

v. a document executed under a falsified, expired, or otherwise invalid power of attorney;

vi. a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or

vii. a defective judicial or administrative proceeding.

b. The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.

C. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

Covered Risks Common to Both Owner's and Loan Policies

Defects in Title

Defects in Title Caused By

Fraud, undue influence, duress, or the like;

Failure of authority;

Improper execution/acknowledgment/Delivery;

Failure to comply with legal requirements for Electronic Documents;

Invalid power of attorney;

Improper filing, recording, or indexing in the Public Records; or

Defective judicial or administrative proceedings.

Tax Related Defects

The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.

Survey Revealing Defects

Encroachments;

Encumbrances;

Violations;

Variations; or

Adverse circumstances.

Covered Risks Common to Both Owner's and Loan Policies

Unmarketable Title

3. Unmarketable Title

Policy Provided Definition:

"Defined as an alleged or apparent matter that affects the Estate or Interest described in Schedule A, that would permit a prospective purchaser, lessee, or lender to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title."

AM JUR Guidance:

"[a] difference exists between economic lack of marketability, which relates to physical conditions affecting the use of the property, and title marketability, which relates to defects affecting legally recognized rights and incidents of ownership. One can hold perfect title to land that is valueless, and one can have marketable title to land while the land itself is unmarketable." 43 AM. JUR. 2d, Insurance, § 528.

The Right of Access

4. No right of access to and from the Land.

Elements of Coverage

The Insured Right

Accessing a Public Road

Legal Access v. Physical Access

NOT the Same

Quality of Access

NOT Insured

Title & Trust Co. of Florida v. Barrows

381 So.2d 1088 (Fla. 1st DCA 1979)

Krause v. Title & Trust Co. of Florida

390 So.2d 805 (Fla. 5th DCA 1980)

Particularity of Access

NOT Insured

Exception – Insured Ingress/Egress Easement

Access Endorsement

NOT Authorized

Covered Risks Common to Both Owner's and Loan Policies

Governmental Regulations

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

a. the occupancy, use, or enjoyment of the Land;

b. the character, dimensions, or location of any improvement erected on the Land;

c. the subdivision of land; or

d. environmental protection

if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce but only to the extent of the violation or enforcement referred to in that notice.

Elements of Coverage	*Condition*	*Limitation*
Violation or Enforcement of *Any law, ordinance, permit, or governmental regulation* *Restricting, regulating, prohibiting, or relating to* *Occupancy;* *Use;* *Enjoyment;* *Character;* *Dimensions;* *Locations of; improvements;* *Subdivision; or* *Environmental protection.*	*So long as* *A Notice* *Describing the land* *Setting forth the violation or intention of enforcement* *Is recorded, and* *The Notice is not listed as an exception.*	*The extent of the violation or enforcement referred to in the notice.*

Covered Risks Common to Both Owner's and Loan Policies

Exercise of Police Powers

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.

Elements of Coverage	*Condition*	*Limitation*
Enforcement Actions *Based on the exercise of Governmental Police Powers.*	*So long as* *A Notice* *Describing the land; and* *Setting forth the violation or intention of enforcement* *Is recorded and* *The Notice is not listed as exceptions.*	*The extent of the violation or enforcement referred to in the notice*

Eminent Domain

7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.

Elements of Coverage	*Condition*
Exercise of Eminent Domain Rights.	*So long as* *A Notice of the Exercise* *Describing the land* *Is recorded.*

Covered Risks Common to Both Owner's and Loan Policies

Governmental Taking

8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

Elements of Coverage	*Condition*
The occurrence of a Taking *By a Governmental Body* *Which is binding on the rights of* *Purchaser* *For value; and* *Without knowledge.*	*Purchaser must be a Purchaser for Value; and* *Purchaser must have been without knowledge.*

Covered Risks Common to Both Owner's and Loan Policies

Creditor's Rights

Loan Policy

13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title

a. resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

b. because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records

i. to be timely, or

ii. to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

Owner's Policy

9. Title being vested other than as stated in Schedule A or being defective

a. as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

b. because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records

i. to be timely, or

ii. to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

Covered Risks Common to Both Owner's and Loan Policies

Creditor's Rights

Elements of Coverage

Defect affecting

Loan Policy	*Owner's Policy*
Validity; *Enforceability;* *Priority; or* *Lien Avoidance*	*Vesting of Title*

Based on a

Prior Transfer	*Current Transfer*
Resulting in Avoidance or Alternative Court Remedy of any transfer of title to or Interest in the Land; or	*Because the recording of the Vesting/Mortgage Instrument was* *Untimely; or* *Did not provide Notice to* *Purchaser for value; or* *Judgment/Lien Creditor.*

Where the Transfer has been declared Fraudulent or Preferential as defined under

US Bankruptcy Code;

State Insolvency Laws; or

General Creditor's Rights Laws.

Covered Risks Common to Both Owner's and Loan Policies

The GAP

Loan Policy

14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

Owner's Policy

10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

Elements of Coverage	*Conditions*
Any defect in;	*Defect occurring*
Any lien on;	*Subsequent to the Date of Policy and*
Any encumbrance on; or	*Prior to the Date of Recording of the Vesting/Mortgage Instrument from Schedule A.*
Any other matter included in any of the Covered Risks	
Loan Policy **Covered Risks 1-13**	
Owner's Policy **Covered Risks 1-9**	
Created, Attached, Filed, or Recorded in the Public Records.	

Florida's GAP Statute F.S. §627.7841

Upon Disbursement of Funds

On a transaction where a Policy will be issued

Automatic insurance for

The possible existence of adverse matters or defects in title

Recorded during the period between

The effective date of the commitment; and
The date of recording of the interest-creating instrument

Except as to matters of which the insured has knowledge.

Covered Risks Exclusive to the Loan Policy

Defects Impairing the Lien

9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage

a. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;

b. failure of any person or Entity to have authorized a transfer or conveyance;

c. the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;

d. failure to perform those acts necessary to create a document by electronic means authorized by law;

e. a document executed under a falsified, expired, or otherwise invalid power of attorney;

f. a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or

g. a defective judicial or administrative proceeding.

Elements of Coverage	*Conditions*
Fraud, undue influence, duress, or the like; *Failure of authority;* *Improper execution/acknowledgment/Delivery;* *Failure to comply with legal requirements for Electronic Documents;* *Invalid power of attorney;* *Improper filing, recording, or indexing in the Public Records; or* *Defective judicial or administrative proceedings.*	*Specifically as they apply to the* *Invalidity of the Insured Mortgage; or* *Unenforceability of the Insured Mortgage.*

Covered Risks Exclusive to the Loan Policy

Lack of Lien Priority

10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.

Elements of Coverage

Lack of Priority

Of the Insured Mortgage

Over any other

Lien; or

Encumbrance.

Construction

11. The lack of priority of the lien of the Insured Mortgage upon the Title as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either

a. contracted for or commenced on or before Date of Policy; or

b. contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance.

Elements of Coverage

Lack of Priority of the Insured Mortgage

For construction liens

When the Improvement or work is

Contracted for or commenced on or before the Policy Date; or

Contracted for, commenced, or continued after the Policy Date if

The loan proceeds financed the construction.

Covered Risks Exclusive to the Loan Policy

Assignee Coverage

12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.

Elements of Coverage

Invalidity/Unenforceability	*Vesting Free and Clear*
Invalidity or *Unenforceability of* *Any Assignment shown in Schedule A of the Insured Mortgage.*	*The Failure of* *Any Assignment shown in Schedule A* *To vest title to the Insured Mortgage* *Into the Insured Assignee* *Free and clear of all liens.*

Policy Conditions

Defining Terms

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

Amount of Insurance

Loan Policy

1(a) "Amount of Insurance":
The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b) or decreased by Section 10 of these Conditions.

Owner's Policy

1(a) "Amount of Insurance":
The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 10 and 11 of these Conditions.

Policy Conditions – Defining Terms

Amount of Insurance

Defined As

The Amount stated on Schedule A.

As Reduced By

Certain payments made under the policy; and

Loan Policy

Any amount forgiven

Owner's Policy

Any amount paid under any Policy Insuring a Mortgage

That is shown as an exception;

That the insured has agreed, assumed or taken subject to; or

Executed by the Insured after the Date of Policy and which is a lien on title (Refi's).

May Be Increased When

The Underwriter pursues its rights in Defense and Prosecution of Actions; and

The Underwriter is unsuccessful in establishing the

Loan Policy

Lien of the Insured Mortgage as insured.

Owner's Policy

Title as insured.

May Be Increased By

The Amount of Insurance shall be increased by 10%; and

The Insured Claimant shall have the right

To have the loss or damage determined either

As of the date the claim was made by the Insured Claimant; or

As of the date the claim is settled and paid.

Policy Conditions – Defining Terms

Insured

Loan Policy

1(e) "Insured":

The Insured named in Schedule A.

(i) The term "Insured" also includes

(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is an obligor under the provisions of Section 12(c) of these Conditions;

(B) the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as these terms are defined by applicable electronic transactions law;

(C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(D) successors to an Insured by its conversion to another kind of Entity;

(E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured, or

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity;

(F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;

(ii) With regard to (A), (B), (C), (D) , and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy.

Policy Conditions – Defining Terms

Insured

Owner's Policy

1(d) "Insured":

The Insured named in Schedule A.

(i) the term "Insured" also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured,

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named insured are both wholly-owned by the same person or Entity, or

(4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) with regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

Policy Conditions – Defining Terms

Insured

Defined As

As identified in Schedule A.

Expansion

Successor to an Insured

Successor to an Insured by

Dissolution

Merger

Consolidation

Distribution

Reorganization

Its conversion to another kind of Entity.

Expansion

Grantees in Non-Consideration Deeds

Grantees under a deed without payment of any actual consideration if

The Grantee is wholly-owned by the Insured;

The Grantee wholly-owns the insured;

The Grantee is wholly-owned by an Affiliated Entity;

So long as that AE and the Insured are both wholly-owned by the same person or entity; or

The Grantee is the Trustee or Beneficiary of

A written trust

Established by the Insured

For estate planning purposes.

Policy Conditions – Defining Terms

Insured

Expansion
The Indebtedness
Loan Policy Specific

The Owner of the Indebtedness; and

Each successor in Ownership of the Indebtedness

Regardless if the Owner or Successor own the Indebtedness

For their own account; or

In a fiduciary capacity

Except for Successors who are also Obligors

Where the Underwriter maintains a right of subrogation against; or

Where the Obligor acquired the Insured mortgage as a result of

An Indemnity Policy;

A Guarantee Policy;

Other Policy of Insurance; or

Bond; and

The Obligor not be an Insured under the Policy.

Expansion
Electronic Transfers Law
Loan Policy Specific

The Person or Entity

Who has "control" of

The "transferable record"

So long as The Indebtedness is evidenced by

A "transferable record".

Expansion
Successorship
Owner's Policy Specific

Successors to Title of the Insured by

Operation of law (distinguished from purchase), including:

Heirs;
Devisees;
Survivors; or
Personal Representative.

Policy Conditions

Continuation of Insurance

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title.

This policy shall not continue inforce in favor of any purchaser from the Insured of either

(i) an estate or interest in the Land, or
(ii) an obligation secured by a purchase money Mortgage given to the Insured.

Coverage is only good

As of the Date of the Policy

In favor of an Insured

So long as

Loan Policy	*Owner's Policy*
The Insured holds an obligation secured by the Mortgage	*The Insured retains an interest in the land; or*

So long as

The insured has liability by reasons of warranties in any Transfer of Title.

Policy Conditions

Notice of Claim

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing

(i) in case of any litigation as set forth in Section 5(a) of these Conditions,

(ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or

(iii) if the Title, as insured, is rejected as Unmarketable Title.

If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

Prompt Written Notice of

Litigation; or

Actual Knowledge of any claim or interest adverse to the Title or lien of the Insured Mortgage

Not constructive knowledge or notice

Rejection by way of Unmarketability.

Exclusions – Mutual to Loan and Owner's Policies

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

Laws, Ordinances, & Governmental Regulations

1.(a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:

(i) the occupancy, use, or enjoyment of the Land;

(ii) the character, dimensions, or location of any improvement erected on the Land;

(iii) the subdivision of land; or

(iv) environmental protection;

or the effect of any violation of these laws, ordinances, or governmental regulations.

This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

1.(b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.

Any Governmental exercise of its Police Powers; or
Violation or Enforcement of any
Law;
Ordinance;
Permit; or
Governmental Regulation
Restricting, Regulating, Prohibiting, or Relating to
Occupancy/Use/Enjoyment;
Character/Dimensions/Locations of improvements;
Subdivision; or
Environmental Protection.

Eminent Domain & Governmental Takings

2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

The exercise of
Eminent domain rights; or
Any governmental Taking
So long as
A proper notice
Is not recorded.

Exclusions – Mutual to Loan and Owner's Policies

Defects, Liens, Encumbrances, Adverse Claims, or Other Matters

3. Defects, liens, encumbrances, adverse claims, or other matters

(a) created, suffered, assumed, or agreed to by the Insured Claimant;

(b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;

(c) resulting in no loss or damage to the Insured Claimant;

(d) attaching or created subsequent to Date of Policy; or

(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage/Title.

Any Defects, Liens, Encumbrances, Adverse Claims or Other Matters

Which the Insured Claimant has

Created;

Suffered;

Assumed; or

Agreed to by the Insured; or

Which are

Not Known to the Company;

Not Recorded as of the Effective Date

But Known and

Not disclosed by the Insured Claimant

Prior to becoming the Insured under the Policy;

Not Resulting in any loss or damage to the Insured; or

Attaching or Created after the Effective Date; or

Resulting in loss or damage

Which would not have been sustained

if the Insured had paid value for the Insured Mortgage/Title.

Exclusions – Mutual to Loan and Owner's Policies

Creditor's Rights

Loan Policy	*Owner's Policy*
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is **(a) a fraudulent conveyance or fraudulent transfer, or** **(b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.**	**4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is** **(a) a fraudulent conveyance or fraudulent transfer, or** **(b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.**

Any Claim that the Insured transaction constitutes

A Fraudulent Conveyance; or

A Preferential Transfer

Other than as listed under Covered Risk.

Loan Policy	*Owner's Policy*
13(b)	*9*

Exclusions – Mutual to Loan and Owner's Policies

Taxes

Loan Policy	*Owner's Policy*
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records.	**5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.**

Real Estate Tax or Assessment Lien

Imposed by Gov't Authority

Created or Attaching in the GAP.

Exclusions – Exclusive to Loan Policy

Resulting Unenforceability

4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.

Unenforceability of

The lien of the Insured Mortgage

Resulting from the non-compliance with

Doing-business laws

Of the State where the Insured Land is.

5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.

Invalidity or Unenforceability of

Any portion of the lien of the Insured Mortgage

Resulting from violation of

Usury laws;

Consumer Credit Protection laws; or

Truth-in-Lending laws.

Endorsements

ALTA Endorsement 9-06 Restrictions, Encroachments, Minerals

Loan Policy

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. **Any incorrectness in the assurance that, at Date of Policy:**

(a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.

(b) Unless expressly excepted in Schedule B:

(1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

(2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.

(3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

(4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

(5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.

Endorsements

ALTA Endorsement 9-06 Restrictions, Encroachments, Minerals

Loan Policy

1. *(a)*

Providing the assurance by way of Affirmative Coverage
Against any loss or damage from
The existence of any Covenants/Conditions/Restrictions which would

Divest;
Subordinate or impair the validity of;
Priority; or
Enforceability of

The Insured Mortgage.

1. *(b)*

Providing the assurance by way of Affirmative Coverage
Unless expressly excepted in Schedule B
Against any loss or damage from

1. *(b)(1)*

Violations on the Land of any Covenants/Conditions/Restrictions; or
Violations of setback lines shown on a plat by any existing improvements on the land.

1. *(b)(2)*

The existence of any Covenants/Conditions/Restrictions which would
Establish an easement;
Provide a lien for liquidated damages;
Provide for a private assessment; or
Provide for an option to purchase/right of first refusal/prior approval of future purchasers/occupants.

1. *(b)(3)*

The existence of any Encroachments of any existing improvement on the insured land or adjoining land.

1. *(b)(4)*

Encroachments of any existing improvements on easements.

1. *(b)(5)*

Recorded Notices of Violation of Covenants/Conditions/ Restrictions relating to Environmental Protection.

Endorsements

ALTA Endorsement 9-06 Restrictions, Encroachments, Minerals

Loan Policy

2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:

(a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or

(b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.

Providing the assurance by way of Affirmative Coverage

Against any loss or damage from

Future violations of existing Covenants/Conditions/ Restrictions

Which occurred prior to acquisition of the interest in the Land,

So long as the violation results in

Impairment of the
Validity;
Priority; or
Enforceability of the Insured Mortgage; or
A reversion of Title.

Endorsements

ALTA Endorsement 9-06 Restrictions, Encroachments, Minerals

Loan Policy

3. Damage to existing improvements (excluding lawns, shrubbery or trees):

(a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

(b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.

Providing the assurance by way of Affirmative Coverage

Against any loss or damage from

Damage to existing Improvements
Located on or encroaching on the portion of Land
Subject to any easement shown in Schedule B
So long as the damage resulted from
The exercise of the right to maintain said easement for its intended purpose; or

Damage to existing Improvements
Resulting from the FUTURE exercise of
Any right to use the land's surface for
Extraction or Development of minerals

Which have been excepted from the Legal description or the policy.

Endorsements

ALTA Endorsement 9-06 Restrictions, Encroachments, Minerals

Loan Policy

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

Providing the assurance by way of Affirmative Coverage

Against any loss or damage from

Any Final Court Orders or Judgments

Requiring the removal of

Any encroachment listed on Schedule B

From any adjoining land.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Providing the assurance by way of Affirmative Coverage

Against any loss or damage from

Final Court Orders or Judgments

Which deny the right to maintain

Any existing improvement on the Land

Due to violation of

Covenants/Conditions/Restrictions; or
Setback lines shown on a plat.

Endorsements

ALTA Endorsement 9-06 Restrictions, Encroachments, Minerals

Loan Policy

What is an unmodified Alta 9-06?

1.(a)
The assurances provided are correct.

1.(b)1 & 5
No violations of the Covenants/Conditions/ Restrictions; and

No violations of the platted setbacks.

1.(b)(2)
The Instruments do not contain

Easements;
Lien rights;
Assessment rights;
Options to purchase;
Rights of first refusal; or
Rights of prior approval of future purchasers or occupants.

1.(b)(3) & 1.(b)(4) & 4
No encroachments of improvements.

1.(b)(5)
No Notices of violation relating to environmental protection.

2.(a) & 2.(b)
No future violation of the restrictions which would affect the lien of the Insured Mortgage or result in the loss of Title or interest in the Land.

3.(a)
No existence of any improvement that would impair the right to maintain an easement.

3.(b)
No existence of right of entry for any mineral interests and if they have been properly released by instrument or statute.

4.
No existence of any boundary disputes.

Endorsements

ALTA Endorsement 9-06 Restrictions, Encroachments, Minerals

Loan Policy

How to issue an Alta 9-06?

Review the areas affected by this endorsement

Covenants/Conditions/ Restrictions;

Plats;

Surveys;

Environmental Protection Instruments; and

Mineral Rights Instruments.

Find it, List it!

Any instrument affecting the interest in the land and recorded in the public records should be specifically listed as an exception in Schedule B.

Listing an instrument as an exception in Schedule B does not necessarily remove Affirmative Coverage provided under the Alta 9-06 for the Instrument.

No Survey Required by the Lender?

If the Lender requires an unmodified Alta 9-06

The Lender requires a survey.

If the Lender is willing to accept a modified Alta 9-06

No survey needed.

Modify the Endorsement to remove from coverage elements of

1b1;

1b3;

1b4;

3;

4; and

5.

Endorsements

ALTA Endorsement 8.1-06 Restrictions, Encroachments, Minerals

Loan Policy

The Company insures against loss or damage sustained by the Insured by reason of lack of priority of the lien of the Insured Mortgage over:

(a) any environmental protection lien that, at Date of Policy, is recorded in those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge, or is filed in the records of the clerk of the United States district court for the district in which the Land is located, except as set forth in Schedule B; or

(b) any environmental protection lien provided by any state statute in effect at Date of Policy, except environmental protection liens provided by the following state statutes: NONE

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Coverage Against loss or damage

Resulting from a lack of priority of the Insured Mortgage

Over Environmental Protection Liens

Recorded as of the Date of the Policy.

Endorsements

ALTA Endorsement 8.1-06 Restrictions, Encroachments, Minerals

Loan Policy

How to issue an Alta 8.1-06?

Determine that

As of the Date of the policy

No Notice of Environment Protection Lien

Including a lien for clean-up and removal

On the record.

Special Note

Under coverage in section b of the 8.1, there is a space for the insertion of any state statute that may create "super lien" priority, but since Florida has yet to enact any such legislation, "None" is added into the endorsement.

Mortgage Priority Guarantee (FMG)

SUBJECT TO THE PROVISIONS, CONDITIONS AND STIPULATIONS HEREIN, Old Republic National Title Insurance Company, a Minnesota Corporation, hereinafter called the Company, guarantees:_____hereinafter called the Insured, against loss or damage, not exceeding the liability amount stated above, and costs, expenses, and attorney fees arising by reason of the establishment by entry of a final order, judgment, or decree of a court of competent jurisdiction that the validity, enforceability, or priority of the Mortgage described herein has been diminished or lost by reason of the modification or amendment, executed by _____ and_____, dated _____ and recorded _____ _____ of official records of _____ County to the indebtedness secured by the recorded Mortgage described as: _____

This guarantee does not assure the validity, enforceability or priority of the above described Mortgage but only assures that the validity, enforceability, or priority of the Mortgage, if any, has not been diminished or lost by reason of the modification shown above.

This guarantee does not assure the status or ownership of the title to the estate or interest in the land described in the Mortgage.

THE COVERAGE GIVEN BY THIS PAGE IS NOT VALID UNLESS THIS PAGE IS ACCOMPANIED BY THE GUARANTEE COVER CONTAINING THE GUARANTEE CONDITIONS AND STIPULATIONS.

What Coverage is Not Provided?

Does not assure the

Validity;
Enforceability; or
Priority

Of the Modification.

It does not replace or endorse the coverage provided by the underlying Loan Policy.

What Coverage is Provided?

Assures that the

Validity;
Enforceability; or
Priority

Of the underlying Mortgage does not suffer

Diminishment; or
Loss

By virtue of the recorded Modification.

Mortgage Priority Guarantee (FMG)

How to Issue the FMG?

No issuance of a

- *Title Search;*
- *Commitment; and*
- *Closing Protection Letter.*

Fixed, flat-rate premium

- *$125.*

The Endorsement can be issued regardless of

- *The underwriter in the underlying policy; or*
- *If the Property is designated Residential or Commercial.*

Review

- *The recorded and unrecorded modification documents between the lender and the borrower; and*
- *Look for anything that may create a Novation.*

What is a Novation?

A determination that the modification of the terms

Terminated the lien of the original mortgage and

Created a new lien as of the recording date of the Modification.

How to Identify a Novation?

What are we Modifying?

Identify any additional Burdens to the Borrower that may

- *Increase the likelihood of default; or*
- *Prejudice the rights of third parties.*

Review the similarity between the parties and collateral from the Original Mortgage to the Modification.

When dealing with Future Advances, review the underlying mortgage

- *Does it allow for any advances?*
- *Does it contemplate the advanced amount?*

When dealing with Renewals or Substitution Mortgages

- *Do any of the terms change?*

Are we modifying the Interest Rate or Maturity Date?

Mortgage Priority Guarantee (FMG)

Sources for Additional Information

The Fund Procedures Handbook *(Rev 08/2015)*

Attorney's Title Fund Services

Chapter 7 & Chapter 9

Mortgage Modifications: Keep it on the Record!

By: Valerie Jahn Grandin

September 2011, *The Fund Concept*

The 'New' Mortgage Priority Guarantee Policy

By: Philip Holtsberg

January 2013, *The Fund Concept*

Back to Speaker Topics

Closing Protection Letter (CPL)

A Brief Primer

The CPL is the undertaking by the underwriter to assume certain liabilities when a closing is performed through an Agent.

These letters outline the conditions under which the title underwriter will accept liability for the acts or omissions of its agents.

They provide conditional coverage against damages arising out of certain claims which an Insured may have against the Agent.

Appendix i

ALTA 2006 Loan Policy of Title Insurance (with Florida Modifications)

American Land Title Association

Adopted 6/17/2006 (rev 12/10)

With Florida Modifications

(American Land Title Association - Loan Policy Adopted 6/17/2006)(With Florida Modifications)

LOAN POLICY OF TITLE INSURANCE

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, a Minnesota corporation (the "Company"), insures, as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

(Covered Risks continued)

In Witness Whereof, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory of the Company.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

By *President*

Attest *Secretary*

SERIAL

MF6 -

Sample

(Covered Risks continued)

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage
   (a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
   (b) failure of any person or Entity to have authorized a transfer or conveyance;
   (c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
   (d) failure to perform those acts necessary to create a document by electronic means authorized by law;
   (e) a document executed under a falsified, expired, or otherwise invalid power of attorney;
   (f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
   (g) a defective judicial or administrative proceeding.
10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.
11. The lack of priority of the lien of the Insured Mortgage upon the Title as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either
   (a) contracted for or commenced on or before Date of Policy; or
   (b) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance.
12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.
13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title
   (a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
   (b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
      (i) to be timely, or
      (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
      (i) the occupancy, use, or enjoyment of the Land;
      (ii) the character, dimensions, or location of any improvement erected on the Land;
      (iii) the subdivision of land; or
      (iv) environmental protection;

   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;
   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy; or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.

Sample

5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.

6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is

(a) a fraudulent conveyance or fraudulent transfer, or

(b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.

7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records.

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b) or decreased by Section 10 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Indebtedness": The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of
(i) the amount of the principal disbursed as of Date of Policy;

(ii) the amount of the principal disbursed subsequent to Date of Policy;

(iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;

(iv) interest on the loan;

(v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;

(vi) the expenses of foreclosure and any other costs of enforcement;

(vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;

(viii) the amounts to pay taxes and insurance; and

(ix) the reasonable amounts expended to prevent deterioration of improvements;

but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.

(e) "Insured": The Insured named in Schedule A.

(i) The term "Insured" also includes

(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is an obligor under the provisions of Section 12(c) of these Conditions;

(B) the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as these terms are defined by applicable electronic transactions law;

(C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(D) successors to an Insured by its conversion to another kind of Entity;

(E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured, or

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity;

(F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;

(ii) With regard to (A), (B), (C), (D) , and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy.

(f) "Insured Claimant": An Insured claiming loss or damage.

(g) "Insured Mortgage": The Mortgage described in paragraph 4 of Schedule A.

(h) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(i) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(j) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(k) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

Sample

(l) "Title": The estate or interest described in Schedule A.

(m) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title or the lien of the Insured Mortgage, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or

(ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

Sample

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of

(i) the Amount of Insurance,

(ii) the Indebtedness,

(iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy, or

(iv) if a government agency or instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage in satisfaction of its insurance contract or guaranty.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.

(d) In addition to the extent of liability under (a), (b), and (c), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, or establishes the lien of the Insured Mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment. However, any payments made prior to the acquisition of Title as provided in Section 2 of these Conditions shall not reduce the Amount of Insurance afforded under this policy except to the extent that the payments reduce the Indebtedness.

(b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

11. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

12. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) The Company's Right to Recover

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Insured's Rights and Limitations

(i) The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if it does not affect the enforceability or priority of the lien of the Insured Mortgage.

(ii) If the Insured exercises a right provided in (b)(i), but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's right of subrogation.

(c) The Company's Rights Against Noninsured Obligors

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(i)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy.

Sample

13. ARBITRATION

Unless prohibited by applicable law, arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association may be demanded if agreed to by both the Company and the Insured at the time of the controversy or claim. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, and service of the Company in connection with its issuance or the breach of a policy provision or other obligation. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the Insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the Land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or lien of the Insured Mortgage or by any action asserting such claim whether or not based on negligence shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

15. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

16. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

17. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at 400 Second Avenue South, Minneapolis, Minnesota 55401-2499, Phone: (612) 371-1111.

Sample

Old Republic National Title Insurance Company

LOAN TITLE INSURANCE POLICY

For information about coverage or assistance in resolving complaints, call (612) 371-1111.

Offices at
400 Second Avenue South
Minneapolis, Minnesota 55401

Appendix ii

ALTA 2006 Owner's Policy of Title Insurance (with Florida Modifications)

American Land Title Association

Adopted 6/17/2006 (rev 12/10)

With Florida Modifications

(American Land Title Association - Owner's Policy Adopted 6/17/2006)(With Florida Modifications)

OWNER'S POLICY OF TITLE INSURANCE

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, a Minnesota corporation (the "Company") insures, as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce but only to the extent of the violation or enforcement referred to in that notice.

(Covered Risks continued)

In Witness Whereof, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory of the Company.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

By *President*

Attest *Secretary*

SERIAL

OF6 -

Sample

(Covered Risks continued)

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. Title being vested other than as stated in Schedule A or being defective

   (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

   (b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
   (i) to be timely, or
   (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

   (i) the occupancy, use, or enjoyment of the Land;

   (ii) the character, dimensions, or location of any improvement erected on the Land;

   (iii) the subdivision of land; or

   (iv) environmental protection;

   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters

   (a) created, suffered, assumed, or agreed to by the Insured Claimant;

   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;

   (c) resulting in no loss or damage to the Insured Claimant;

   (d) attaching or created subsequent to Date of Policy; or

   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.
4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is

   (a) a fraudulent conveyance or fraudulent transfer; or

   (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.
5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

sample

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 10 and 11 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Insured": The Insured named in Schedule A.

(i) the term "Insured" also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured,

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

(4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) with regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": An Insured claiming loss or damage.

(f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) "Title": The estate or interest described in Schedule A.

(k) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

Sample

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,

Sample

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE

The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION

Unless prohibited by applicable law, arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association may be demanded if agreed to by both the Company and the Insured at the time of the controversy or claim. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, and service of the Company in connection with its issuance or the breach of a policy provision or other obligation. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the Insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the Land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim whether or not based on negligence shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

Sample

16. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

17. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at 400 Second Avenue South, Minneapolis, Minnesota 55401-2499, Phone: (612) 371-1111.

Sample

Old Republic National Title Insurance Company

OWNER'S TITLE INSURANCE POLICY

For information about coverage or assistance in resolving complaints, call (612) 371-1111.

Offices at
400 Second Avenue South
Minneapolis, Minnesota 55401

Appendix iii

ALTA 2006 Loan Policy Endorsement 9-06 (with Florida Modifications)

Restrictions, Encroachments, Minerals

American Land Title Association

Adopted 6/17/2006 (rev 05/14)

With Florida Modifications

Example of Restrictions, Encroachments, Minerals Endorsement (ALTA 9-06)

ALTA ENDORSEMENT 9-06 RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:
   (a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
   (b) Unless expressly excepted in Schedule B:

   (1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

   (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.

   (3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

   (4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

   (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.

2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:
   (a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or
   (b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.

3. Damage to existing improvements (excluding lawns, shrubbery or trees):
   (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
   (b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraph 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

_____ _____
Name of Agent Agent No.

_____ **Old Republic National Title Insurance Company**
Agent's Signature **By** **Mark A. Bilbrey**
President

ALTA 9-06 Endorsement - Restrictions, Encroachments, Minerals (Florida Modified) (rev. 05/14)

Sample

Appendix iv

ALTA 2006 Loan Policy Endorsement 8.1-06 (with Florida Modifications)

Environmental Protection Lien

American Land Title Association

Adopted 6/17/2006 (rev 12/10)

With Florida Modifications

Example of Environmental Protection Lien Endorsement (ALTA 8.1-06)

ALTA ENDORSEMENT 8.1-06 ENVIRONMENTAL PROTECTION LIEN

Old Republic National Title Insurance Company

Endorsement No. to Policy No.:

The Company insures against loss or damage sustained by the Insured by reason of lack of priority of the lien of the Insured Mortgage over:

(a) any environmental protection lien that, at Date of Policy, is recorded in those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge, or is filed in the records of the clerk of the United States district court for the district in which the Land is located, except as set forth in Schedule B; or

(b) any environmental protection lien provided by any state statute in effect at Date of Policy, except environmental protection liens provided by the following state statutes:

NONE

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Sample

Name of Agent

Agent No.

Old Republic National Title Insurance Company

_____

Agent's Signature

By **Mark A. Bilbrey**
President

ALTA Endorsement 8.1-06 Environmental Protection Lien (rev.12/10) (With Florida Modifications)
File Number: **01-2012-1967/01257**

DoubleTime® 6.0

Appendix v

ALTA Mortgage Priority Guarantee

FMG

American Land Title Association

(10/2012)

With Florida Modifications

MORTGAGE PRIORITY GUARANTEE

Sample

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

SERIAL

FMG-

By *President*

Attest *Secretary*

FMG (10/2012)

GUARANTEE CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS

The following terms when used in this Guarantee mean:

(a) "Insured": the party or parties named as the Insured in this Guarantee. The term "Insured" also includes

(i) the owner of the indebtedness secured by the Mortgage and each successor in ownership of the indebtedness reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of any adverse claim or other matter insured against by this Guarantee;

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness, or any part thereof, whether named as an Insured herein or not;

(b) "Date": the effective date;

(c) "Mortgage": mortgage, deed of trust, trust deed, or other security instrument.

2. DEFENSE AND PROSECUTION OF ACTIONS: DUTY OF INSURED TO COOPERATE

(a) Upon written request by the Insured and subject to the options contained in Section 4 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim adverse to the assurance given herein that the priority of the Mortgage described herein has not been diminished or lost by reason of the modification or amendment to the indebtedness. The Company shall have the right to select counsel of its choice to represent the Insured and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the Insured in the defense of matters not insured by this Guarantee.

(b) The Company shall have the right to institute and prosecute any action or proceeding to establish that the priority of the Mortgage has not been diminished or lost by the modification. The Company may take any appropriate action under the terms of this Guarantee, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this Guarantee.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this Guarantee, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this Guarantee permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the Insured hereunder shall secure to the Company the right to prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (1) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (2) in any other act which in the opinion of the Company may be necessary or desirable to establish that the priority of the described Mortgage has not been diminished or lost by reason of the modification. If the required cooperation shall not be furnished, the Company's obligations to the Insured under the Guarantee shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation with regard to the matter or matters requiring cooperation.

3. NOTICE OF LOSS - LIMITATION OF ACTION

A statement in writing of any loss or damage for which it is claimed the Company is liable under this Guarantee shall be furnished to the Company within sixty days after the loss or damage shall have been determined, and no right of action shall accrue to the Insured under this Guarantee until thirty days after the statement shall have been furnished, and no recovery shall be had by the Insured under this Guarantee unless action shall be commenced thereon within two years after expiration of the thirty day period. Failure to furnish the statement of loss or damage or to commence the action within the time hereinbefore specified, shall be a conclusive bar against maintenance by the Insured of any action under this Guarantee.

4. OPTION TO PAY, SETTLE OR COMPROMISE CLAIMS

The Company shall have the option to pay, settle or compromise for or in the name of the Insured any claim which could result in loss to the Insured within the coverage of this Guarantee, or to pay the full amount of this Guarantee, or the Company shall have the option to purchase the indebtedness secured by the Mortgage. The purchase, payment or tender of payment of the full amount of the Guarantee shall terminate all liability of the Company. In the event after notice of claim has been given to the Company by the Insured, the Company offers to purchase the indebtedness, the owner of the indebtedness shall transfer and assign the indebtedness and the Mortgage to the Company upon payment of the purchase price.

5. LIMITATION OF LIABILITY - PAYMENT OF LOSS

(a) The liability of the Company under this Guarantee shall be limited to the amount of actual loss sustained by the Insured because of reliance upon the assurances herein set forth, but in no event shall the liability exceed the amount of the liability stated on the face page hereof.

(b) No claim for loss or damage shall arise or be maintainable under this Guarantee (1) if the Company after having received notice of the claim settles or otherwise removes the claim within a reasonable time after receipt of the notice, or (2) for liability voluntarily assumed by the Insured in settling any claim or suit without written consent of the Company.

(c) All payments under this Guarantee, except for attorney's fees as provided for in Section 2 hereof, shall reduce the amount

SAMPLE

GUARANTEE CONDITIONS AND STIPULATIONS *(continues)*

of the liability hereunder pro tanto, and no payment shall be made without producing this Guarantee for endorsement of the payment unless the Guarantee be lost or destroyed, in which case proof of the loss or destruction shall be furnished to the satisfaction of the Company.

(d) When liability has been definitely fixed in accordance with the conditions of this Guarantee, the loss or damage shall be payable within thirty days thereafter.

6. SUBROGATION UPON PAYMENT OR SETTLEMENT

Whenever the Company shall have settled a claim under this Guarantee, all right of subrogation shall vest in the company unaffected by any act of the Insured, and it shall be subrogated to and be entitled to all rights and remedies which the Insured would have had against any person or property in respect to the claim had this Guarantee not been issued. If the payment does not cover the loss of the Insured, the Company shall be subrogated to the rights and remedies in the proportion which the payment bears to the amount of the loss. The Insured if requested by the Company shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect the right of subrogation, and shall permit the Company to use the name of the Insured in any transaction or litigation involving the rights or remedies.

7. EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this Guarantee and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

(a) Defects, liens, encumbrances, adverse claims, or other matters: (i) created, suffered, assumed or agreed to by the Insured; (ii) not known to the Company, not recorded in the public records at date of this Guarantee, but known to the Insured and not disclosed in writing to the Company by the Insured prior to the date of this Guarantee; (iii) attaching or created subsequent to date of this Guarantee;

(b) Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to date of this Guarantee and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at date of this Guarantee the insured has advanced or is obligated to advance.

(c) Any claim, which arises out of the transaction modifying or amending the mortgage described herein or the indebtedness secured thereby by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on: (i) the transaction being deemed a fraudulent conveyance or fraudulent transfer; or (ii) the subordination of the interest of the Insured as a result of the application of the doctrine of equitable subordination; or (iii) the transaction being deemed a preferential transfer except where the preferential transfer results from the failure (1) to timely record the instrument(s) amending the mortgage or indebtedness; or (2) of such recordation to impart notice to a purchaser for value or a judgement or lien creditor.

8. GUARANTEE ENTIRE CONTRACT

Any action or actions or rights of action that the Insured may have or may bring against the Company arising out of the subject matter hereof must be based on the provisions of this Guarantee. No provision or condition of this Guarantee can be waived or changed except by a writing endorsed or attached hereto signed by the President, a Vice President, the Secretary, an Assistant Secretary or other validating officer of the Company.

9. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at 400 Second Avenue South, Minneapolis, Minnesota 55401.

Sample

FMG (10/2012)

Sample

Old Republic National Title Insurance Company

MORTGAGE PRIORITY GUARANTEE

For information about coverage or assistance in resolving complaints, call (612) 371-1111

Offices at
400 Second Avenue South
Minneapolis, Minnesota 55401

FMG (10/2012)

MORTGAGE PRIORITY GUARANTEE

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Liability $ _____ FMG Serial No. _____

Fee $ _____ Your Ref. _____

SUBJECT TO THE PROVISIONS, CONDITIONS AND STIPULATIONS HEREIN, Old Republic National Title Insurance Company, a Minnesota Corporation, hereinafter called the Company, guarantees:

hereinafter called the Insured, against loss or damage, not exceeding the liability amount stated above, and costs, expenses, and attorney fees arising by reason of the establishment by entry of a final order, judgment, or decree of a court of competent jurisdiction that the validity, enforceability, or priority of the Mortgage described herein has been diminished or lost by reason of the modification or amendment, executed by _____ and _____, dated _____ and recorded _____ of official records to the indebtedness secured by the recorded Mortgage described as:

This guarantee does not assure the validity, enforceability or priority of the above described Mortgage but only assures that the validity, enforceability, or priority of the Mortgage, if any, has not been diminished or lost by reason of the modification shown above.

This guarantee does not assure the status or ownership of the title to the estate or interest in the land described in the Mortgage.

Sample

THE COVERAGE GIVEN BY THIS PAGE IS NOT VALID UNLESS THIS PAGE IS ACCOMPANIED BY THE GUARANTEE COVER CONTAINING THE GUARANTEE CONDITIONS AND STIPULATIONS.

Issued through the office of:

Old Republic National Title Insurance Company

400 Second Avenue South, Minneapolis, Minnesota 55401, (612) 371-1111

_____ _____ _____

ISSUING AGENT AGENT NO. AGENT'S SIGNATURE

_____ _____ , Florida , _____

MAILING ADDRESS CITY STATE ZIP

FMG SCH. A (10/2012) (With Florida Modifications)

Appendix vi

Closing Protection Letter

ORT Form 4574 ATFS

Single Transaction

(04/02/2014)

With Florida Modifications

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

c/o ATFS: 6545 Corporate Centre Blvd. • Orlando, Florida 32822
Toll Free Phone: 1.800.432.9594 x7385
Toll Free Fax: 1.800.929.5554
Email: cplrequest@thefund.com

Closing Protection Letter • Single Transaction

CLOSING PROTECTION LETTER 2016-1022365
March 25, 2016
Sample Copy
its successors and/or assigns, as their interest may appear
Attn: Loan Closing Department
Sample Copy
Sample Copy, FL 00000

FUND MEMBER NUMBER: 8999

ORNTIC AGENT NUMBER: Q09509

Closing Protection Letter on Behalf of:

TEST NUMBER
DO NOT MAIL
ORLANDO, FL 32862

To verify this agent is in good standing, go to www.oldrepublictitle.com, select Agent Verifications from the Products and Services dropdown and enter in Agent Number referenced above.

In consideration of Your acceptance of this letter, Old Republic National Title Insurance Company (the "Company"), agrees to indemnify You for actual loss of Funds incurred by You in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney on or after the date of this letter, subject to the Conditions and Exclusions set forth below and provided:

(A) the Company issues or is contractually obligated to issue a Policy for Your protection in connection with the closing of the Real Estate Transaction;

(B) You are to be the (i) lender secured by the Insured Mortgage or (ii) purchaser or lessee of the Title;

(C) the aggregate of all Funds You transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed the amount of the title insurance policy issued to the party benefitted by this letter in connection with the Real Estate Transaction; and

(D) Your loss is solely caused by:
1. failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:
   (a) the disbursement of Funds necessary to establish the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage; or
   (b) the obtaining of any document, specifically required by You, but only to the extent that the failure to obtain the document affects the status of the Title or the validity, enforceability, or priority of the lien of the Insured Mortgage;

   or

2. fraud, theft, dishonesty, or misappropriation of the Issuing Agent or Approved Attorney in handling Your Funds or documents in connection with the closing, but only to the extent that the fraud, theft, dishonesty, or misappropriation relates to the status of the Title or to the validity, enforceability, or priority of the lien of the Insured Mortgage.

Sample

Conditions and Exclusions

1. Your transmittal of Funds or documents to the Issuing Agent or Approved Attorney constitutes Your acceptance of this letter.

2. For purposes of this letter:
   a. "Commitment" means the Company's written contractual agreement to issue the Policy.
   b. "Funds" means the money received by the Issuing Agent or Approved Attorney for the Real Estate Transaction.
   c. "Policy" or "Policies" means the contract or contracts of title insurance, each in a form adopted by the American Land Title Association (with Florida modifications), issued or to be issued by the Company in connection with the closing of the Real Estate Transaction.
   d. "You" or "Your" means the Addressee of this letter, the borrower if the Land is solely improved by a one-to-four family residence, and subject to all rights and defenses relating to a claim under this letter that the Company would have against the Addressee,
      (i) the assignee of the Insured Mortgage; and
      (ii) the warehouse lender in connection with the Insured Mortgage.
   e. "Indebtedness," "Insured Mortgage," "Land," and "Title" have the same meaning given them in the American Land Title Association Loan Policy (06-17-06) (with Florida modifications).

3. The Company shall have no liability under this closing protection letter for loss arising out of:
   a. failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions that require title insurance protection inconsistent with that set forth in the Commitment. Your written closing instructions received and accepted by the Issuing Agent or Approved Attorney after issuing the Commitment that require the removal, where allowed by state law, rule, or regulation, of specific Schedule B Exceptions from Coverage or compliance with the requirements contained in the Commitment shall not be deemed to require inconsistent title insurance protection;
   b. loss or impairment of Your Funds in the course of collection or while on deposit with a bank due to bank failure, insolvency, or suspension, except loss or impairment resulting from failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions to deposit the Funds in a bank that You designated by name;
   c. any constitutional or statutory lien or claim of lien that arises from services, labor, materials, or equipment, if any Funds are to be used for the purpose of construction, alteration, or renovation. This subsection does not affect the coverage, if any, as to any lien for services, labor, materials, or equipment afforded in the Policy;
   d. fraud, theft, misappropriation, dishonesty, or negligence of Your employee, agent, attorney, or broker;
   e. Your settlement or release of any claim without the Company's written consent;
   f. any matters created, suffered, assumed, or agreed to or actually known by You;
   g. Federal consumer financial law, as defined in 12 U.S.C. § 5481 (14), or other federal or state laws relating to truth-in-lending, a borrower's ability to repay a loan, qualified mortgages, consumer protection, or predatory lending;
   h. federal or state laws establishing the standards or requirements for asset-backed securitization including, but not limited to, exemption from credit risk retention;
   i. the periodic disbursement of Funds to pay for construction, alteration, or renovation on the Land relating to the Real Estate Transaction; or
   j. the Issuing Agent or Approved Attorney acting in the capacity of a qualified intermediary or facilitator for tax deferred exchange transactions as provided in Section 1031 of the Internal Revenue Code.

4. If the closing is to be conducted by an Approved Attorney, a Commitment must have been received by You prior to the transmittal of Your final closing instructions to the Approved Attorney.

5. When the Company shall have indemnified You pursuant to this letter, it shall be subrogated to all rights and remedies You have against any person or property had You not been indemnified. The Company's liability for indemnification shall be reduced to the extent that You have impaired the value of this right of subrogation.

6. The Company's liability for loss under this letter shall not exceed the least of:
   a. the amount of Your Funds;
   b. the Company's liability under the Policy at the time written notice of a claim is made under this letter;
   c. the value of the lien of the Insured Mortgage; or
   d. the value of the Title insured or to be insured under the Policy at the time written notice of a claim is made under this letter.

Sample

7. If You are not a purchaser, borrower, or lessee, You must hold the Indebtedness both at the time that the Company is notified of a claim pursuant to this letter and at the time that payment is made to make a claim for indemnification under this letter.

8. Payment to You or to the owner of the Indebtedness under the Policy or Policies or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to the Conditions of the Policy.

9. The Issuing Agent is the Company's agent only for the limited purpose of issuing Policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for Your loss arising from closing or settlement services is strictly limited to the contractual protection expressly provided in this letter. Other than as expressly provided in this letter, the Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.

10. In no event shall the Company be liable for a loss if the written notice of a claim is not received by the Company within two years from the date of the transmittal of Funds. The condition that the Company must be provided with written notice under this provision shall not be excused by lack of prejudice to the Company.

11. You must promptly send written notice of a claim under this letter to the Company at its principal office at 400 Second Avenue South, Minneapolis, Minnesota 55401. If the Company is prejudiced by Your failure to provide prompt notice, the Company's liability to You under this letter shall be reduced to the extent of the prejudice.

12. The Company shall have no liability under this letter if:
    a. the Real Estate Transaction has not closed within one year from the date of this letter; or
    b. at any time after the date of this letter, but before the Real Estate Transaction closes, the Company provides written notice of termination of this letter to the Addressee at the address set forth above.

13. The protection of this letter extends only to real estate in Florida, and any court or arbitrator shall apply the law of the jurisdiction where the Land is located to interpret and enforce the terms of this letter. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law. Any litigation or other proceeding under this letter must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

14. You may request that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association. A claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and You at the time the claim is made. If the Real Estate Transaction solely involves a one-to-four family residence and You are the purchaser or borrower, the Company will pay the costs of arbitration.

This closing protection letter supersedes and cancels any previous letter or similar agreement for closing protection that applies to the Real Estate Transaction.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Margaret A. Williams

By:_____, Authorized Signatory

Margaret A Williams
Assistant Vice President

Sample

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FUND ASSEMBLY 2016

FORECLOSURES IN THE CHAIN OF TITLE

RESIDENTIAL REAL ESTATE TRACK

Andrew L. Fivecoat, St. Petersburg

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SPEAKER INFORMATION

FORECLOSURES IN THE CHAIN OF TITLE

Andrew L. Fivecoat
Licensed Title Agent

Andrew L. Fivecoat graduated with a B.S.B.A. degree in Finance and a Certificate of Completion for Risk Management / Insurance from the University of Florida.

He obtained his J.D. and M.B.A. degrees from Stetson University. Mr. Fivecoat is a member of the Federal Bar for the Middle, Northern and Southern Districts of Florida. He has practiced as a Creditor Rights attorney for eighteen years focusing on foreclosure, bankruptcy, REO closings, real estate litigation and title issues throughout Florida. Mr. Fivecoat is a licensed Title Agent for several national underwriters and regularly teaches the USF Residential Mortgage Foreclosure Mediation Certification Course.

Foreclosures in the Chain of Title

Andrew L. Fivecoat, eXL Legal, St. Petersburg, Florida

Title Issues Post Foreclosure

Background

Why is there such an issue with title after a foreclosure? The object of a foreclosure is to obtain marketable title to the property. The reason for the increased number of title problems post foreclosure is largely due to two related issues.

First is the large volume of home sales between 2000 and 2007. During this time, many people entered the title industry with little or no previous experience. This led to improper or poorly executed title examinations and closing documents. As a result, mistakes were not caught as the title companies just relied on the legals that were used for the last transaction and did not thoroughly review the legal description.

The second phase started in 2007 and occurred when the housing market crashed. Once the property values dropped, foreclosures started to skyrocket. This put the foreclosure firms in the same predicament as the title companies before. They had to hire staff as fast as they could. Many employees were hired without proper training to examine title or how to determine if there was a problem. Many title companies tried to switch from doing closings to having their examiners prepare pre-foreclosure title commitments. Many of the properties coming into the REO market had title examined over four years ago when the volumes were still very high.

I. Things to look out for:

1. Missed spouses -

Many firms only include the spouse if they lived at the property. If the spouse signed the mortgage then their redemption rights in the mortgage must be eliminated. Some firms did not name the spouse since they were not on title, did not sign the note and were not living at the property.

2. Notices of Lis Pendens that were released due to a dismissal during the foreclosure -

Foreclosure cases were dismissed for various reasons such as lack of prosecution, voluntary dismissals, failure to appear at hearings (courts set many Case Management Hearings and noticed the attorney that filed the complaint instead of the current attorney handling the case.) If plaintiff's counsel could show good cause to set aside the dismissal, the court's would reinstate the case. However, when a case is dismissed, the lis pendens is automatically dissolved. Fla. R. C. P. 1.420(f) and Fla. Statute §48.23. See attached Title Teaser. In very rare cases, a new lis pendens was filed. Plaintiff's firms mistakenly believe the reinstated case automatically reactivates the lis pendens. It does not and any liens or judgments that were recorded since the filing of the case through the recording of a new lis pendens should be addressed. For example, a third party that relied on the public records by providing a mortgage or other property secured by a UCC-1 has a very good argument that their lien is not barred by the lis pendens and survived the foreclosure. In order to eliminate the lien you would need to file a reforeclosure or an action to compel redemption.

3. Decedent's property -

The death of an owner is another area where you will find title issues. Due to the length of time foreclosures were taking, many defendants passed away during the foreclosure process.

a. **Pre-Judgment** – If the decedent passed away prior to judgment, a diligent search for heirs must be completed and should include searching for a probate in the jurisdiction where the property lies, where the last known residence was, and where the borrower died. Any known and unknown heirs must be named in the foreclosure as title owners. Many firms will name the heirs but then fail to run name searches and include any liens that attached to the property via the heir.

If there was not a probate filed or one was filed and has yet to vest title of the property to the heirs, an affidavit of diligent search must be prepared showing

the search efforts and results. This affidavit is filed by the plaintiff's attorney where service was accomplished by publication in order to provide clear title.

There are many instances where in addition to service by publication a guardian/attorney ad litem may be required for the purposes of title insurance. See Title Note 12.08.01(B). There are a few judges that refuse to appoint Guardian/Attorney Ad Litems as there is not a statutory provision requiring it.

Some firms do not conduct thorough heir searches. They will rely on obituaries, however it is possible that an obituary could omit names of legal heirs, due to lack of knowledge or estrangement of family members.

b. **Post-Judgment** – If a decedent passes away post judgment it is not necessary name the heirs in the foreclosure. *Davis v. Scott, 97 Fla. 148, (Fla. 1929).*

II. Issues with Pleadings:

1. Captions -

Do not rely on the caption of the foreclosure to determine the defendants. Many judges will not allow you to change the caption once the case is filed without a specific court order. Because of this, many firms just leave the caption as originally filed and defendants may be dismissed, inadvertently dropped during an amendment or never added when an amended complaint was filed.

2. Legal Descriptions -

Metes and bounds legal descriptions of any length should be reviewed by two people. This was a delay and a luxury that most firms could not afford. Firms just had whoever typed in the legal do their own proof reading. Many of these individuals did not understand what they were typing or its importance. If they saw something they thought was wrong they would attempt to correct it. Some were not critical such as changing

"iron rod" to "iron road" but others were critical when changes to metes and bounds calls were made.

In addition, just because you see the legal description is correct on one pleading does not mean it is correct on the other pleadings. You need to check the lis pendens, complaint, judgment, the notice of sale and certificate of title. It is not uncommon for legal descriptions to be inadvertently changed during the foreclosure. If the clerk does not catch the difference, the mistake would continue through to the certificate of title. Some clerks are good about not recording the certificate of title due to the error but most are not. Many properties are referred to REO before the certificate of title is issued and may have a contract in place before the legal description error is noticed.

III. Clearing title post foreclosure for missed owners or lien holders

1. If it is an owner - Owners are indispensable parties in foreclosure actions. The failure to name an owner can result in a void judgment, In order to clear title, the following are options**:**

a. **Deed** – can obtain a deed into the current owner.

b. **Reforeclose** – This will require going through with a new foreclosure sale. In addition, if the owner wants to redeem the property they can do so for the payoff amount at the time the original foreclosure was initiated. *Tejedo v. Secretary of Veterans Affairs*, *673 So.2d 959, (3rd DCA 1996).* The missed owner should not be penalized for being omitted in the first foreclosure and not being provided the opportunity to redeem the property. You may be able to file a supplemental action to reforeclose in the same action if the court reserved jurisdiction. This jurisdiction must be specific to allow the filing of a supplemental complaint to add omitted parties. *Ross v. Wells Fargo, 113 So3.d 256, (3rd DCA 2013)*

c. **Disclaimer of Interest** - If the owner is an heir that was missed, you could obtain a disclaimer of interest. Florida Statutes § 739 describes how and when interests may be disclaimed. This may work but you must follow the probate rules to determine who has an interest when a disclaimer is done. A disclaimer is treated as the person predeceases the vesting of their interest. For example, a single individual's interest that is disclaimed would pass to their children if living or if not then the parents. So obtaining a disclaimer from an individual could lead to a greater number of interests and not fewer. It may be easier to reforeclose. However, if there are multiple children and one was missed (with no children of their own) then a disclaimer may be the most expedient option.

2. For a non-owner interest – junior mortgage, liens, judgments

a. **Reforeclosure -** A reforeclosure will require a verified complaint in accordance with Florida Rules of Civil Procedure 702.015. However, you will not need to conduct another foreclosure sale. *Quinn Plumbing Co, Inc. v. New Miami Shores Corporation*, *100 Fla. 413 (Fla 1930).* The judgment of reforeclosure should include:

i. a specified time (normally 20 days) for the missed lien holder to redeem the property. Some judge's will eliminate the time if the defendants were personally served and defaulted.

ii. If the property is not redeemed you will want language in the judgment to include that upon filing an affidavit of non-redemption, the lien shall be forever foreclosed of all right, title, interest, estate, or claim in the property, and shall be forever barred and foreclosed of any and all equity or right of redemption in and to said property. Or, at a minimum, for judgment language to say that if the defendant has not exercised its right of redemption within 20 days from the date of this judgment, the lien shall be forever foreclosed of all right, title, interest, estate, or claim in the property, and shall be forever barred and foreclosed of any and all equity or right of redemption in and to said property. Again the

redemption amount is determined as the payoff amount when the original foreclosure action was filed.

b. **Declaratory Action to Compel Redemption** - This is a faster option as you do not need to have a verified complaint as this is not a "foreclosure" complaint. You will need to follow the same process as the reforeclosure of a non-owner.

Some firms have attempted to file Motions to Compel Redemption in the foreclosure case post judgment to eliminate interests. The motion was mailed to the lien holder providing them thirty days to redeem or be foreclosed out. The firm obtained an order foreclosing the lien yet the lien holder was never served with a summons and complaint and the court never had jurisdiction over the lien holder. You must make sure you review the complaint, service returns, court orders and judgments to confirm the defendants were properly included as a party in the action.

IV. Curing legal description errors after certificate of title is issued

The type of post-judgment/post-title motion that can be used depends on the severity of the error in the legal description. See Fund Concept Article March, 1991.

1. Clerical error

a. If a Clerical error is made in the inputting of the information into the legal description, such as where "Lot 1B" is inputting instead of "Lot 18", a motion to correct clerical error in the affected documents can be filed, pursuant to Florida Rule of Civil Procedure 1.540(a).
b. However, if the error is more than a de minimis error and clogs equity of redemption, the prior foreclosure sale and certificate of title should also be vacated and a new sale rescheduled and published with the correct legal description.
c. If the error is included in the judgment, sale and certificate of title, then in accordance with *Wells Fargo Bank, N.A. v. Giesel, 155 So.3d 41, 1st DCA Dec 2014*, that the foreclosure must begin anew. The court held that this is

not a new foreclosure action but that the plaintiff must vacate the certificate of title, sale, judgment and amend the complaint to include a count to reform the mortgage.

d. Also, if the error existed in the Lis Pendens, you should run a title search and bring title current, making sure that no additional interests attached to the property that may need to be extinguished.

2. Missed reformation of mortgage/deed language in final judgment

If there was an error in the legal description in either the mortgage or a deed in the chain of title this should have been included as an additional count in the complaint. Many times this count failed to be addressed in the final judgment. If this occurs you can move for judgment on the reformation count and requesting the judge grant judgment Nunc Pro Tunc to the date of the original final judgment.

3. Missed reformation of mortgage/deed language not in the complaint but it is in the judgment

At times you may see the reformation count included in the judgment but not in the complaint. This could be proper if there was a consent judgment by all parties or if it was raised as an ore tenus motion during the hearing and the court granted the motion. The problem is how can you determine that this was not added to the judgment and never properly raised to the court.

4. Part of property missing from legal description

a. In the event the legal description is discovered to have been incomplete/insufficient to describe the entire property, the most simple and expedient method of curing the issue is to find the last owner of record of this missing portion of the property and seek a corrective deed from them.

b. In the event a deed is not possible, you can sue to quiet title in the omitted real property, under color of title by virtue of the certificate of title you received through the foreclosure action.
c. You could also sue to reform each of the incorrect deeds in the chain of title. However, you will need to name every party to the affected deeds. It is very difficult to track down individuals from older deeds.

5. **Judgment is over one year old -** If the judgment is over one year old, then Fla. R. Civ Pro. 1.540(b) may prevent you from setting aside the judgment. In *Epstein v. Bank of America, 162 So.3d 159 (4th DCA Jan. 2015)* the plaintiff tried to vacate the final judgment to correct a legal description 2 years after judgment was entered. Plaintiff argued the judgment was void and therefore they were not required to file within the one year requirement of Florida Rule of Civil Procedure 1.540(b). The court found that the judgment was voidable because the court had personal and subject matter jurisdiction that was properly invoked. The court did hint that since the owner of the erroneously described property was not before the court and if that person appeared to challenge the judgment it might have led them to determine the judgment was void.

Many foreclosure cases have judgments that are well over a year old and will fall under the Epstein decision.

***Each foreclosure action and subsequent insured transactions involve unique factual scenarios; therefore, the acceptable curative action will vary from transaction to transaction. It is essential that the insuring underwriter will agree to insure based upon the curative action taken. Determine the insuring underwriter and confirm acceptable resolution prior to taking curative action.

Also make sure you are using The Florida Title Standards to assist in reviewing issues with legal descriptions. Many times title examiners don't do everything they can to eliminate an issue as it is easier and involves less risk to require a curative document rather than spending the additional time to find a different solution.

For legal descriptions, the courts have set the priority of items to determine what controls in the legal description. *Calder v. Hillsboro Land Co., 122 So.2d 445 (Fla. 2d DCA 1960)*. The items listed in order of importance are: Natural monuments, artificial monuments, distances, courses and quantity.

Several years ago, the GSE's decided to take a hard line and refuse to accept any property that has a title defect. If you obtain an indemnity letter from an underwriter or if the issue falls under the Mutual Indemnity Treaty, the GSE's will not accept these as eliminating the defect if it appears on a commitment. They will demand that the servicer buy back the loan and cancel the closing. This is why you must review any issues that appear on the commitment and determine if they are an actual defect or the examiners preference. Many times you can have them take another look and have the issue removed.

V. Resolving Code Liens and Association Liens

1. Municipal Code Liens

Fortunately in 2013, the Florida Supreme Court in *The City of Palm Bay v. Wells Fargo Bank, N.A., 114 So.3d 924 (Fla. 2013),* did resolve the issue with municipalities attempting to create a super-priority status for the liens. Many city and county code enforcement boards still try and collect everything they can and will refuse to release their lien that was foreclosed or issue certificates of compliance without some sort of payment. Or they have a new lien that is barred by the lis pendens yet they refuse to acknowledge that it never attached to the property.

If the code lien is filed against the new owner after the certificate of title is issued, many municipalities will agree to reduce any daily fines if the property is brought into

compliance and there is a new buyer for the property. However, some municipalities will refuse to reduce the fines as it is a revenue source. In these cases, you will need to make sure they noticed the new owner properly. Many times they are reviewing the tax role to determine the owner and are not aware the certificate of title was issued to someone else. Without actual notice to the new owner, their daily fines are not proper. But you will need to bring the property into compliance.

2. Associations Liens -

Reviewing Association Estoppels - The first thing to determine is whether you are dealing with a condominium association or a homeowner's association (HOA). This is done by reviewing the legal description. If it is a condo association, the word condominium must appear in the legal description. If not it will fall under the HOA area.

a. **Condo Association** – The Florida Statute governing safe harbor for condo associations is §718.116. The statute states that the liability of a first mortgagee or its successor or assignees who acquire title to a unit by a foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lessor of:

   The unit's unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months (prior to July 1, 2010 this amount was 6 months) immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

   One percent of the original mortgage debt. The provisions of this paragraph apply only if the first mortgagee joined the association as a defendant in the foreclosure action. Joinder of the association is not required if on the date the complaint is filed, the association was dissolved.

i. **Mortgage executed prior to July 1, 2010** - You will need to determine if the 6 months of the unpaid common expenses and regular periodic assessments or 1% of the original principal, whichever is less. This should be the amount owed according to safe harbor.

ii. **Mortgage executed after July 1, 2010** – You will need to determine if the 12 months of the unpaid common expenses and regular periodic assessments or 1% of the original principal, whichever is less. This should be the amount owed according to safe harbor. The statute is not applied retroactively but it may not be worth litigating the amount if it is small.

The estoppel should not include any attorney fees, late charges, special assessments etc. that occurred prior to the issuance of the certificate of title. If any of these items came due after the certificate of title is issued then you would be responsible. You will need to question any amounts that seem excessive and when they occurred. Some associations will try to include special assessments that were assessed prior to the certificate of title. The association would have to show that this was something every unit was assessed at the same time and after certificate of title was issued.

Condo associations are regulated by the Division of Florida Condominiums, Timeshares and Mobile Homes. If the association is not cooperative in resolving the estoppel issue, you can file a complaint and seek the assistance of the Division of Florida Condominiums. Attached is a copy of the website and a complaint form.

b. Homeowner's **Associations** – The Florida statute governing safe harbor for HOA's is §720.3085 which became effective on July 1, 2007. It states that the liability of a first mortgagee, or its successor or assignee as a

subsequent holder of the first mortgage who acquires title to a parcel by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title, shall be the lesser of:

The parcel's unpaid common expenses and regular periodic or special assessments that accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

One percent of the original mortgage debt.

The limitations on first mortgagee liability provided by this paragraph apply only if the first mortgagee filed suit against the parcel owner and initially joined the association as a defendant in the mortgagee foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved.

The problem with the paragraph above is that the name of the HOA does not have to have any relation to the legal description. Therefore it is very easy to miss a HOA or master association and not initially join them in the action.

i. **Mortgage executed prior to July 1, 2007** – The statute cannot be applied retroactively. *Pudlit 2 Joint Venture, LLP, v. Westwood Gardens Homeowner's Association, Inc., 169 So.3d 145 (Fla. 4th DCA 2015)* You must review the association declaration to determine if there are any amounts owed. Most declarations state that whoever takes title from the foreclosure or a deed in lieu of a first mortgage is liable only for the amounts assessed after they came into title. The prior amounts owed to the association is extinguished and/or to be divided equally among the units in the association. The declaration and not the statute is the controlling document. The court in *Pudlit* stated:

> "The declaration of condominium, which is the condominium's 'constitution,' creates the condominium and 'strictly governs the relationships among the condominium unit owners and the condominium association.' A declaration of condominium must be strictly construed." Curci Vill. Condo. Ass'n v. Maria, 14 So.3d 1175, 1177 (Fla. 4th DCA 2009) (citation omitted). Furthermore, "[r]estrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms..." Shields v. Andros Isle Prop. Owners Ass'n, 872 So.2d 1003, 1005–06 (Fla. 4th DCA 2004) (citation omitted). "Under Florida law, which governs this dispute, 'courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship or improvident bargain.' " United States v. Bridgewater Cmty. Ass'n, 2013 WL 3285399, at *9 (M.D.Fla. June 27, 2013) (citation omitted).

ii. **Mortgage executed on or after July 1, 2007** – In this scenario the statute may apply but the declaration is still the controlling instrument. Most declarations have not been amended to include language regarding the statute or the safe harbor provision. If the declaration extinguishes the lien, then you will only owe the amounts that came due after the certificate of title was issued. If the declaration does not extinguish the lien, you will need to determine if the 12 months of the

unpaid common expenses and regular periodic assessments or 1% of the original principal, whichever is less.

As with Condo associations, the estoppel should not include any attorney fees, late charges, special assessments etc. that occurred prior to the issuance of the certificate of title. If any of these items came due after the certificate of title is issued then you would be responsible. You will need to question any amounts that seem excessive and when they occurred.

c. **Litigating Association Estoppels –** For the purposes of title insurance, an estoppel is required for current transactions. If the Association provides an estoppel for more than it is entitled to, then litigation is an option. If litigation is necessary, most declarations provide for attorney fees to be paid to the prevailing party. This is one way of making sure the association is aware of what their representatives are doing and will help prevent future egregious estoppel claims.

i. **Prior to litigating** – Prior the filing of either a motion or a new action for such relief, you should first offer to counsel the amounts you have calculated to be due, and that such amounts are being tendered in full satisfaction of the account.

ii. **Jurisdiction** - In *Central Mortgage Co. v. Callahan, 155 So.3d 373, 375–76 (Fla. 3d DCA 2014)* the court stated that the foreclosure court must specifically reserve jurisdiction in the final judgment to determine the amounts owed the association. If it is not specifically reserved and the motion is not filed within the time to file a motion for rehearing then the court loses jurisdiction and a separate action will need to be filed.

iii. **Association Tactics** - This has become a more common and expensive issue for lenders. These collection firms believe that, while safe harbor for associations might be given for assessments (under §720.3085 and §718.116), it does not give the lenders safe harbor for

past due interest/late fees/costs/attorney's fees due from the prior owner/borrower. These are the items with which these collection firms try to gouge the lender. However, the statute is clear and only makes the lender responsible for "assessments", not "interest/late fees/costs/attorney's fees", so there's not even an underlying basis to charge these items to the lender.

iv. **Attorney Fees** - keep in mind that almost every (if not every) association has a clause that permits the recovery of your attorney's fees from the association upon a successful resolution of your motion/case

Here is a link to an article explaining the business model of LM Funding America which is now defending class actions where it is accused of illegal practices. In addition, LM Funding America recently became a publicly traded company.

http://www.tampabay.com/news/business/realestate/lawsuits-attack-business-model-of-tampas-lm-funding/2259905

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2014 Title Teasers - Part I

By John D. Benson, Fund Sr. Underwriting Counsel; Donna M. More, Fund Vice President - Commercial Services and Sr. Underwriting Counsel; Silvia Rojas, Fund Sr. Underwriting Counsel

1. LIS PENDENS & LIEN REVIVAL

Q. *In 2010, Gigantic Bank filed a mortgage foreclosure action. A lis pendens was properly recorded. The case remained dormant for over a year and the court dismissed it due to record inactivity. More than one year after the dismissal, Gigantic Bank's new counsel successfully petitioned the court to vacate the order of dismissal and reinstate the foreclosure action. For purposes of insuring title, which of the following statements is true about the lis pendens?*

A. The lis pendens was discharged when the case was dismissed, and a new lis pendens is required.

B. The lis pendens became effective again once the order of dismissal was vacated.

C. If the order vacating the dismissal states that it is retroactive, nunc pro tunc, the lis pendens remains effective.

A. The correct answer is A. In Florida, the lis pendens statute is Sec. 48.23, F.S., and the applicable court rule is Fla. R. C. P. 1.420(f). Because this case was an action based upon a recorded instrument, the lis pendens continued to bar intervening interests and liens as long as the case remained pending in accordance with the statute. The pendency of the proceeding came to an end once the case was initially dismissed.

The entry of the order vacating the dismissal, even had it contained nunc pro tunc language would not change this outcome, as Fla. R. C. P. 1.420 makes clear. Subsection (f) states: "(f) Effect on Lis Pendens. If a notice of lis pendens has been filed in connection with a claim for affirmative relief that is dismissed under this rule, the notice of lis pendens connected with the dismissed claim is automatically dissolved at the same time. The notice, stipulation, or order shall be recorded."

There are no laws, rules or cases which provide for the revival or resurrection of the validity of a lis pendens once it has been dissolved. However, a timely appeal of the dismissal of a case constitutes the continued pendency of the action for evaluating the effectiveness of the lis pendens. *Vonmitschke-Collande v. Kramer*, 841 So.2d 481 (Fla. 3d DCA).

For title insurance purposes, a new lis pendens would be required, the title search and examination updated through the recordation of the new lis pendens, and appropriate amendments made to the foreclosure complaint to join defendants with junior interests that must be foreclosed.

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97 Fla. 148
Supreme Court of Florida.

DAVIS et al.
v.
SCOTT.

Feb. 6, 1929.

En Banc.

Suit by Elsie Gile Scott against William A. Davis, Jr., as ancillary executor of the last will and testament of W. A. Davis, deceased, and Laura S. Davis. From a decree of foreclosure, and from the decree confirming the sale of the mortgaged property, defendants appeal.

Affirmed.

West Headnotes (1)

[1] **Mortgages**
Abatement on Death of Party

Final foreclosure decree and decree confirming sale *held* valid, notwithstanding death of main defendant prior to confirmation.

1 Cases that cite this headnote

Syllabus by the Court

Final foreclosure decree and decree confirming sale held valid, notwithstanding death of main defendant prior to confirmation. Final decree of foreclosure and decree confirming sale *held* valid, where death of main defendant occurred between entry of final decree and confirmation of sale, and Rev. Gen. St. 1920, § 3734 (Comp. Gen. Laws 1927, § 5606), giving administrators six months to pay debts of deceased, was not violated, and decree of confirmation was not shown to be unjust or irregular.

****1 *149** Appeal from Circuit Court, Dade County; Jefferson B. Browne, judge.

Attorneys and Law Firms

A. B. & C. C. Small and Wallace Ruff, all of Miami, for appellants.

Burwell, Barrett & Sibley, of Miami, for appellee.

Opinion

TERRELL, C. J.

This appeal is from an ordinary foreclosure decree and from the decree confirming the sale of the lands foreclosed against.

It is contended here that the decree confirming the sale of the lands foreclosed against is erroneous because (1) the main defendant died prior to the entry thereof though subsequent the final decree, and no one had been substituted as a party defendant in his stead; (2) under section 3734, Revised General Statutes of Florida (section 5606, Compiled General Laws of Florida), administrators are given six months to pay the debts of the deceased whom they represent; and (3) the master's report was irregular and amounted to a nullity.

It is well settled that a suit of this kind abates on the date of the death of the main defendant, but in this case final decree of foreclosure had been entered before the death of the main defendant, and there is no attempt whatever on the part of the appellant to show that such final decree or the decree confirming the sale was unjust, irregular, illegal, or deprived him of any legal right. The assignment with reference to the master's report does not appear to be supported by the record, nor is it shown that section 3734, R. G. S. of Fla., is violated.

The decree below is therefore affirmed.

Affirmed.

WHITFIELD, ELLIS, STRUM, and BUFORD, JJ., concur.

BROWN, J., not participating.

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Davis v. Scott, 97 Fla. 148 (1929)

120 So. 1

All Citations

97 Fla. 148, 120 So. 1

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673 So.2d 959
District Court of Appeal of Florida,
Third District.

Jose TEJEDO, Appellant,
v.
SECRETARY OF VETERANS AFFAIRS, an Officer of the United States of America, Appellee.

No. 95-1279.
|
May 22, 1996.

Foreclosing mortgagee brought postforeclosure action to compel lienor who had been omitted from foreclosure action through no fault of his own either to redeem property or to forfeit all interest therein. The Circuit Court, Dade County, Michael H. Salmon, J., entered summary final judgment requiring omitted lienor to redeem, and lienor appealed. The District Court of Appeal, Fletcher, J., held that amount which omitted lienor had to pay to exercise his right of redemption was amount he would have been required to pay had he elected to redeem promptly upon filing mortgage foreclosure complaint, with no addition for any interest accruing subsequent to filing of suit or for expenses of suit.

Reversed and remanded.

West Headnotes (3)

[1] **Mortgages**
Lienholders

Lienor who has been omitted from mortgage foreclosure action can be compelled by later action to exercise his right of redemption, and if he fails to redeem, can be barred from claiming any lien or interest in or to property.

1 Cases that cite this headnote

[2] **Mortgages**
Amount Required to Redeem
Mortgages
Interest

Amount which omitted lienor must pay, in postforeclosure action brought to compel omitted lienor to exercise his right of redemption or to forfeit all interest in mortgaged property, is to be determined from mortgage debt and not from judgment of foreclosure; omitted lienor cannot be compelled to pay costs or expenses of foreclosure.

2 Cases that cite this headnote

[3] **Mortgages**
Amount Required to Redeem
Mortgages
Interest
Mortgages
Fees, Costs, and Expenses

Amount which omitted lienor had to pay, in postforeclosure action brought to compel lienor to exercise his right of redemption or to forfeit all interest he had in mortgaged property, was amount which he would have been required to pay had he elected to redeem promptly upon filing of mortgage foreclosure complaint, with no addition for any interest accruing subsequent to filing of suit or any costs or expenses of suit.

Cases that cite this headnote

Attorneys and Law Firms

***959** Amador & Amador and Rolando A. Amador, Miami, for appellant.

Faber & Gitlitz and James D. Keegan, Coral Gables, for appellee.

***960** Before NESBITT, COPE and FLETCHER, JJ.

Opinion

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FLETCHER, Judge.

Defendant Jose Tejedo has appealed a summary final judgment requiring him to redeem certain real property as a lienor who was omitted as a party, through no fault of his own, from a mortgage foreclosure action filed in 1983 by the plaintiff Secretary of Veterans Affairs. We reverse as there remains a genuine issue of material fact as to the redemption amount that Tejedo is required to pay.

[1] [2] A lienor such as Tejedo who has been omitted from a mortgage foreclosure action can be compelled by a later action to exercise his right to redemption and, if he fails to redeem, be barred from claiming any lien or interest in or to the property. *Quinn Plumbing Co. v. New Miami Shores Corp.*, 100 Fla. 413, 129 So. 690 (1930). The amount which must be paid to accomplish such forced redemption is to be determined from the mortgage debt, not from the judgment of foreclosure, and the omitted lienor cannot be compelled to pay the costs or expenses of the foreclosure of the mortgage. *Quinn*, 129 So. at 693.

Thus, Tejedo is entitled to the equity of redemption at the amount he would have been required to pay if he had elected to redeem promptly upon the filing of the mortgage foreclosure complaint (case no. 83-2100-CIV-Davis in the United States District Court for the Southern District of Florida). Nowhere in the record do we find an affidavit or other document setting forth that amount. Indeed, the amount required by the trial court appears to be based on the final judgment in the 1983 foreclosure action (together with additional sums), in conflict with the holding in *Quinn.*

[3] Accordingly, we reverse the summary final judgment and remand for further proceedings. The amount for redemption by Tejedo shall be that amount he would have been required to pay had he elected to redeem promptly upon the filing of the mortgage foreclosure complaint. *Thecsuccess Corp. v. Graham*, 577 So.2d 590 (Fla. 4th DCA 1991). The amount shall not include any interest subsequent to the filing of suit or any costs or expenses of suit.

Reversed and remanded for further proceedings in accordance with this opinion.

All Citations

673 So.2d 959, 21 Fla. L. Weekly D1197

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114 So.3d 256
District Court of Appeal of Florida,
Third District.

Alec ROSS, Appellant,
v.
WELLS FARGO BANK, Appellee.

No. 3D11–3007.
|
Feb. 13, 2013.
|
Rehearing Denied June 14, 2013.

Synopsis

Background: After mortgagee obtained a final **judgment** of **foreclosure** against mortgagor, mortgagee sought leave to file a supplemental complaint to assert a cause of action for re-**foreclosure** against mortgagor and to add a third party as a defendant. The Circuit Court, Miami–Dade County, Michael A. Genden, J., granted mortgagee's motion, subsequently dismissed the re-**foreclosure** action for lack of prosecution, and then reinstated re-**foreclosure** action. Third party appealed.

[Holding:] The District Court of Appeal, Emas, J. held that the circuit court lacked subject matter **jurisdiction** over the re-**foreclosure** proceedings.

Reversed and remanded with directions to reinstate final **judgment** of **foreclosure** and vacate orders pertaining to re-**foreclosure**.

West Headnotes (2)

[1] **Appeal and Error**
Transfer of **jurisdiction** in general
Courts
Loss or divestiture of **jurisdiction**

Generally, a trial court loses **jurisdiction** upon the rendition of a final **judgment** and expiration of the time allotted for altering, modifying or vacating the **judgment**; however, the court retains **jurisdiction** to the extent such is specifically **reserved** in the final **judgment** or to the extent provided by statute or rule of procedure.

4 Cases that cite this headnote

[2] **Mortgages**
Conclusiveness, Operation, and Effect of **Judgment** or Decree

Trial court that entered final **judgment** of **foreclosure** against mortgagor, which contained only a general **reservation** of **jurisdiction**, **did not** retain **jurisdiction** over mortgagee's supplemental complaint, which sought to add an omitted party and institute re-**foreclosure** proceeding against mortgagor after entry of final **judgment**, and, thus, trial court lacked subject matter **jurisdiction** over re-**foreclosure** proceedings.

3 Cases that cite this headnote

Attorneys and Law Firms

***256** Ritter Chusid Bivona & Cohen, and Gregory J. Ritter and Shawn R. Horwick, for appellant.

Carlton Fields and Dean A. Morande and Donna L. Eng, West Palm Beach, for appellee.

Before WELLS, Chief Judge, and CORTIÑAS and EMAS, JJ.

Opinion

EMAS, J.

Alec Ross ("Ross") appeals a non-final order which reinstated Wells Fargo Bank's ("Wells Fargo") post-**judgment** re-**foreclosure** proceedings against Ross, after that re-**foreclosure** action had been dismissed for lack of prosecution. We reverse because the trial court lacked subject matter **jurisdiction** to permit the post-**judgment** re-**foreclosure** proceeding.

On March 21, 2008, Wells Fargo filed a Mortgage

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Foreclosure Complaint against Zion Tarazi, ("Tarazi"). On July 8, 2008, Wells Fargo obtained a final judgment of foreclosure against Tarazi. On November 24, 2008, Wells Fargo filed a motion for leave to file a supplemental complaint to assert a cause of action for re-foreclosure against Tarazi, and to add Ross as a defendant. The trial court granted Wells Fargo's motion on December 3, 2008. Thereafter, the trial court entered, and later vacated, an order dismissing the re-foreclosure for lack of prosecution. Ross appeals ***257** the trial court's order vacating the dismissal order and reinstating the re-foreclosure action, contending that the trial court was without subject-matter jurisdiction to permit the post-judgment re-foreclosure action to proceed.[1]

[1] [2] Generally, a trial court loses jurisdiction upon the rendition of a final judgment and expiration of the time allotted for altering, modifying or vacating the judgment. *Patin v. Popino*, 459 So.2d 435 (Fla. 3d DCA 1984). The court retains jurisdiction to the extent such is specifically reserved in the final judgment or to the extent provided by statute or rule of procedure. *Ross v. Damas*, 31 So.3d 201 (Fla. 3d DCA 2010); *Harrell v. Harrell*, 515 So.2d 1302 (Fla. 3d DCA 1987). In the instant case, the trial court entered a final judgment of foreclosure against Tarazi on July 8, 2008. That final judgment contained only a general reservation of jurisdiction: "The Court retains jurisdiction of this action to enter further Orders that are proper including, without limitation, writs of possession and deficiency judgments." The final judgment did not retain jurisdiction to allow for a supplemental complaint to add an omitted party post-judgment. In permitting such a supplemental post-judgment proceeding, the trial court acted in the absence of jurisdiction.[2] *Travelers Cas. & Sur. Co. of Am. v. Sidman*, 103 So.3d 900 (Fla. 2d DCA 2012); *Damas*, 31 So.3d at 203; *Patin*, 459 So.2d at 436. Therefore, the December 3, 2008 order granting Wells Fargo's motion for leave to file a supplemental complaint to add Ross as a party, the order dismissing the re-foreclosure for lack of prosecution, and the subsequent order vacating that dismissal, are each a nullity.

We reverse and remand with directions to vacate these three orders, to reinstate the final judgment entered on July 8, 2008, and for further proceedings consistent with this opinion.[3]

All Citations

114 So.3d 256, 38 Fla. L. Weekly D350

Footnotes

1 Because we hold the trial court had no jurisdiction to permit the re-foreclosure proceeding, we do not reach Ross's second claim—that the trial court abused its discretion in vacating the order dismissing the re-foreclosure for lack of prosecution.

2 Wells Fargo argues that Ross's jurisdictional argument was not properly preserved below and cannot be raised for the first time on appeal. This argument is without merit. *See Colucci v. Greenfield*, 547 So.2d 224 (Fla. 3d DCA 1989) (holding that the trial court's subject matter jurisdiction may be raised at any time); *accord Jared v. Jackson*, 483 So.2d 51 (Fla. 4th DCA 1986).

3 Our decision is without prejudice to Wells Fargo filing a separate foreclosure action against the previously-omitted defendant. *FNS4, LLC v. Security Bank, N.A.*, 88 So.3d 215 (Fla. 3d DCA 2011); *Abdoney v. York*, 903 So.2d 981 (Fla. 2d DCA 2005).

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100 Fla. 413
Supreme Court of Florida, Division A.

QUINN PLUMBING CO., Inc.,
v.
NEW MIAMI SHORES CORPORATION.

Aug. 1, 1930.

Suit by the New Miami Shores Corporation against the Quinn Plumbing Company, Incorporated. From an order overruling a demurrer to the bill, defendant appeals.

Affirmed.

ELLIS, J., dissenting.

West Headnotes (12)

[1] **Mortgages**
Right to Redeem in General

Right to redeem is incident to every mortgage.

5 Cases that cite this headnote

[2] **Subrogation**
Purchasers at Execution or Other Judicial Sale

Purchaser at irregular foreclosure sale is subrogated to all rights of mortgagee.

4 Cases that cite this headnote

[4] **Mortgages**
Persons Concluded and Persons Who May Set Up Conclusiveness of Decree

Foreclosure decree does not affect rights of junior mortgagee not joined as party.

2 Cases that cite this headnote

[5] **Subrogation**
Purchasers at Execution or Other Judicial Sale

Purchaser at defective foreclosure sale may enforce rights of mortgagee as against junior mortgagee not joined in foreclosure proceeding to extent that such rights could have been enforced in original foreclosure.

4 Cases that cite this headnote

[6] **Mortgages**
Compelling Redemption

In absence of countervailing equities, purchaser in possession under defective foreclosure proceedings to which junior mortgagee, through inadvertence, was not made party, could sue to compel junior mortgagee to redeem within reasonable time.

2 Cases that cite this headnote

[7] **Mortgages**
Amount Required to Redeem

Where senior mortgage has been foreclosed and junior mortgagee was inadvertently omitted as party, amount payable by junior mortgagee to redeem is determinable from first mortgage debt.

6 Cases that cite this headnote

[8] **Mortgages**
Amount Required to Redeem

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Junior incumbrancer, whose mortgage covers part only of premises covered by senior mortgage, must generally pay entire senior mortgage debt to redeem.

Cases that cite this headnote

[9] **Mortgages**
Amount Required to Redeem

Mortgagee or purchaser at foreclosure sale may waive right to require junior mortgagee holding mortgage on part of lands to pay entire senior mortgage debt to redeem.

12 Cases that cite this headnote

[10] **Mortgages**
Amount Required to Redeem

Purchaser under defective foreclosure could not compel junior mortgagee inadvertently omitted as party, whose mortgage covered part of premises only, to redeem by payment of amounts specified with reference to parcels in release clause of first mortgage.

4 Cases that cite this headnote

[11] **Mortgages**
Operation and Effect

Subsequent redemption by junior mortgagee omitted as party to foreclosure amounts to purchase of rights acquired by purchaser at defective foreclosure sale.

3 Cases that cite this headnote

[11] **Debtor and Creditor**
Marshaling Assets and Securities

Right of junior mortgagee to seek marshaling of security rests upon equitable principles.

Cases that cite this headnote

[12] **Mortgages**
Lienholders

Only absolute right of junior mortgagee as against senior mortgagee is to redeem from senior mortgage.

2 Cases that cite this headnote

Syllabus by the Court.

The right to redeem is an incident to every mortgage and belongs to the mortgagor and those claiming under him. This right cannot be extinguished except by due process of law.

The purchaser of mortgaged property at a foreclosure sale, when for any reason the foreclosure proceedings are imperfect or irregular, becomes subrogated to all the rights of the mortgagee in such mortgage and to the indebtedness that it secured, and becomes entitled to a suit de novo for the foreclosure of such mortgage against all parties holding junior encumbrances who were omitted as parties to the foreclosure proceeding under which the purchaser bought.

As against a senior mortgagee, the only absolute right of a junior mortgagee is the right to redeem from the senior mortgage. The right to seek a marshaling of the security in appropriate cases is not absolute, but rests upon equitable principles.

Where a senior mortgage has been foreclosed, and a junior incumbrancer was not made a party, the decree is binding as to those who were joined as parties, but does not affect the rights of the junior mortgagee who was omitted. The rights of such omitted person are neither enlarged nor diminished by the defective foreclosure.

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When a senior mortgage has been foreclosed, and a junior mortgagee omitted as a party, the purchaser at such defective foreclosure sale occupies the same position as the senior mortgagee. The former rights of the senior mortgagee may be enforced by such purchaser against the junior mortgagee to the same extent as they could have been enforced in the original foreclosure had the junior mortgagee been made a party thereto. The junior mortgagee may defend to the same extent as if the irregular foreclosure had not occurred.

In the absence of countervailing equities which would render such course inequitable, when a first mortgage has been foreclosed in a suit to which a junior mortgagee, through inadvertence, was not made a party, a purchaser in possession under the sale may maintain a suit to compel the junior mortgagee to exercise his right of redemption within a reasonable time, in default of which the right of redemption of the junior mortgagee may be foreclosed and barred.

When a senior mortgage has been foreclosed, and a junior mortgagee was omitted as a party, the amount which must be paid by such junior mortgagee in order to redeem is to be determined from the first mortgage debt, not from the decree of foreclosure to which he was not a party.

The general rule, subject to some exceptions, is that a junior incumbrancer, whose mortgage covers a part only of the premises covered by the senior mortgage, must pay the whole amount of the senior mortgage debt in order to redeem therefrom.

The rule that a junior mortgagee, holding a mortgage on part only of the lands covered by a senior mortgage, must pay the entire senior mortgage debt in order to redeem therefrom, is for the benefit of the senior mortgagee, and the latter or the purchaser at a foreclosure sale under the senior mortgage may waive the right to enforce redemption for the whole amount of the senior mortgage debt, and accept from one entitled to redeem a proportionate part of the debt, discharging the senior lien upon the portion so released.

When a senior mortgage has been foreclosed, but there was omitted as a party a junior mortgagee whose mortgage covered part only of the premises embraced in the senior mortgage, the purchaser at the sale under the defective foreclosure of the first mortgage cannot compel the junior mortgagee to redeem from the first mortgage by one method, to the exclusion of other modes of redemption to which the junior mortgagee may be entitled, nor to the exclusion of the potential equities of the junior mortgagee to seek a marshaling of the securities.

When a senior mortgage has been foreclosed and the premises purchased at the foreclosure sale, but a junior mortgagee was omitted as a party to the foreclosure of the senior mortgage, a subsequent redemption from the senior mortgage by the junior mortgagor will ordinarily amount not only to a redemption, but, as against a purchaser under the defective foreclosure, amounts also to a purchase of the rights acquired by such purchaser at the sale under the senior mortgage, so that the junior mortgagee upon redemption will succeed to the rights of such purchaser, as well as to the rights of the senior mortgagee.

***416 **691** Appeal from Circuit Court, Dade County; Paul D. Barns, Judge.

Attorneys and Law Firms

James A. Dunn and Carl T. Hoffman, both of Miami, for appellant.

George T. Clark and Clark & Ellis, all of Miami, for appellee.

Opinion

STRUM, J.

A first mortgage upon real property was foreclosed and the property sold. A mortgagee who held a second mortgage on a small part of the incumbered land was not made a party to the foreclosure of the first mortgage. The property was purchased at the foreclosure sale by one not a party to either mortgage. This suit, brought by the purchaser at the foreclosure sale under the first mortgage, ****692** is for the purpose of disposing of the rights of the second mortgagee.

The first mortgage contained a conventional release clause which provided that the mortgagor could procure the release of parcels of the land upon the payment of specified amounts. This bill of complaint prays that the second mortgagee be required to redeem the lands covered by the second mortgage, by the payment of the amounts specified with reference thereto in the release clause of the first mortgage, in default whereof the second mortgagee's right to redeem be barred.

The chancellor overruled a demurrer to the bill, from which order this appeal is taken.

[1] The right to redeem is an incident to every mortgage

and belongs to the mortgagor and those claiming under him. This right cannot be extinguished except by due process of law. After the foreclosure of a mortgage, redemption may be had by any person entitled to it who was not made a party to the suit. ***417** Bryan v. Kales, 162 U. S. 411, 16 S. Ct. 802, 40 L. Ed. 1020. The purchaser at such a sale takes the premises subject to the right of a junior mortgagee, who was not made a party to the foreclosure of a prior mortgage, to redeem from the senior mortgage. Howard v. Milwaukee, etc., 101 U. S. 837, 25 L. Ed. 1081; Jones v. Williams, 155 N. C. 179, 71 S. E. 222, 36 L. R. A. (N. S.) 426; Morse v. Smith, 83 Ill. 396; Hodgen v. Guttery, 58 Ill. 431; Jones on Mortgages (8th Ed.) § 1342; Wiltsie on Mortgage Foreclosure (4th Ed.) §§ 1054, 1149; 42 C. J. 357, 372.

[2] It is well established in this jurisdiction that the purchaser of mortgaged property at a foreclosure sale, when for any reason the foreclosure proceedings are imperfect or irregular, becomes subrogated to all the rights of the mortgagee in such mortgage and to the indebtedness that it secured. Such purchaser becomes virtually an equitable assignee of the mortgage and of the debt it secured, with all rights of the original mortgagee, and becomes entitled to an action de novo for the foreclosure of such mortgage against all parties holding junior incumbrances who were omitted as parties to the foreclosure proceedings under which the purchaser bought. Crystal R. Lbr. Co. v. Knight Turp. Co., 69 Fla. 288, 67 So. 974, Ann. Cas. 1917D, 574; Key West Wharf Co. v. Porter, 63 Fla. 448, 58 So. 599, 610, Ann. Cas. 1914A, 173; Meyer v. Florida Home Finders, 90 Fla. 128, 105 So. 267; Jordan v. Sayre, 29 Fla. 100, 10 So. 823. See also Dutcher v. Hobby, 86 Ga. 198, 12 S. E. 356, 10 L. R. A. 472, 22 Am. St. Rep. 444; Johns v. Wilson, 180 U. S. 440, 21 S. Ct. 445, 45 L. Ed. 613; Burns v. Hiatt, 149 Cal. 617, 87 P. 196, 117 Am. St. Rep. 157; 19 R. C. L. 635(452).

[3] As against a senior mortgagee, the only absolute right of a junior mortgagee is the right to redeem from the senior mortgage. Parker v. Child, 25 N. J. Eq. 41; Jones on Mortgages (8th Ed.) § 1781. The right to seek a ***418** marshaling of the security in appropriate cases is not absolute, but rests upon equitable principles.

[4] When a first mortgage has been foreclosed, and a junior incumbrancer has not been made a party, the decree is valid as to those who were joined as parties, but of course is not binding upon, nor does it in any wise affect, the rights of the junior mortgagee who has been omitted. The rights of such omitted person remain precisely as they were before the proceedings were instituted. They are neither enlarged nor diminished by the defective foreclosure. McGough v. Sweetser, 97 Ala. 361, 12 So. 162, 19 L. R. A. 470. As to such omitted junior mortgagee the situation is the same as if no foreclosure had occurred. Key West Wharf Co. v. Porter, supra; Crystal R. Lbr. Co. v. Knight Turp. Co., supra; Wiltsie on Mortgage Foreclosure (4th Ed.) 1055.

[5] The purchaser at such a foreclosure sale occupies the same position as the first mortgagee, having become equitably subrogated to his rights, which may be enforced by such purchaser against the junior mortgagee to the same extent as they could have been enforced in the original foreclosure, had the junior mortgagee been made a party thereto. The junior mortgagee may defend to the same extent as if the irregular foreclosure had not occurred.

[6] In the absence of countervailing equities, some of which will be mentioned hereafter, when a first mortgage has been foreclosed in a suit to which a junior mortgagee, through inadvertence, was not made a party, a purchaser in possession under the sale may maintain a suit to compel the junior mortgagee to exercise his right of redemption within a reasonable time, just as he could have been compelled to exercise it in the original foreclosure had he been made a party thereto, in default of which the right of redemption of the second mortgagee may be foreclosed and barred. Key West Wharf Co. v. Porter, Crystal R. Turp. Co. v. ***419** Knight, supra; Parker v. Child, 25 N. J. Eq. 41; Shaw v. Heisey, 48 Iowa, 468; Nelson v. Bank, 199 Iowa, 804, 202 N. W. 847; Manhattan Bank v. Wamego Bank, 103 Kan. 865, 176 P. 658; 42 C. J. 356; Jones on Mortgages (8th Ed.) § 1781. There are instances, however, in which such a course would be inequitable. Morey v. City of Duluth, 69 Minn. 5, 71 N. W. 694.

If any fraud or mala fides was practiced in connection with the failure to make the second mortgagee a party, that might constitute a countervailing equity which would place the matter in an entirely different light, especially in this case in view of the extraordinarily large part of the proceeds of ****693** the sale which was devoted to 'costs and expenses,' which conceivably might have been reduced upon the objection of the junior mortgagee, so as to make the situation of his mortgage more favorable. If it were shown that the second mortgage was deliberately omitted as a party so as to deprive it of the opportunity (not the absolute right) of bidding the property up to an amount sufficient to cover its second mortgage, or to deprive it of the opportunity to contest the amounts devoted to 'costs and expenses' in order to conserve proceeds available to pay off the second mortgage, an entirely different question might be presented. But no

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such contention is as yet advanced. The bill sufficiently alleges, and the demurrer admits, that the omission of the second mortgagee was due solely to inadvertence; that an abstract was procured preliminary to foreclosure, and that the second mortgage did not appear thereon; that the first mortgagee having no actual knowledge of the existence of the second mortgage, therefore, did not make the second mortgagee a party. Thus the omission of the second mortgagee as a party appears from the allegations of the bill to have been an innocent omission, at least one involving no bad faith.

[7] ***420** Those considerations just mentioned become even less important in the present aspect of this case when the well-established rule is considered that the second mortgagee who was not made a party cannot, in a suit to require him to redeem or be foreclosed, be compelled to pay the costs or expenses of the foreclosure of the first mortgage. The amount which must be paid by such junior mortgagee in order to redeem is to be determined from the first mortgage *debt*, not from the decree of foreclosure to which he was not a party, and which is therefore not binding upon him. Jones v. Dutch, 3 Neb. (Unof.) 673, 92 N. W. 735; Wiltsie on Mortgage Foreclosure (4th Ed.) § 1210; Jones on Mortgages § 1388.

Another countervailing equity which might conceivably be imposed to prevent the operation of the rule above stated would be the equitable right of the junior mortgagee, whose mortgage covers only a part of the premises covered by the first mortgage, to insist upon a marshaling of the securities. If that right were asserted and maintained (see 38 C. J. 1367 et seq.), complainant might be entitled only to a conventional decree of foreclosure by sale; the lands to be sold in such order as upon the evidence seems just and equitable. See Morey v. City of Duluth, 69 Minn. 5, 71 N. W. 694.

But the fact that complainant might not be entitled to the exact relief specifically prayed for is not ground for demurrer, if upon the facts alleged and under the general prayer complainant is entitled to any relief consistent therewith.

Upon the facts alleged, complainant is certainly entitled to a foreclosure de novo against the omitted junior mortgagee. The question is as to the propriety of the mode of relief selected. The bill of complaint alleges facts sufficient to justify relief by foreclosure and sale if that be hereafter determined to be the equitable course. So the ***421** bill is not without equity. The nature of the relief to which the complainant is ultimately entitled depends upon the defense interposed by the junior mortgagee. If no countervailing equities are shown, a decree may be entered requiring the junior mortgagee to redeem or be barred. If the junior mortgagee had been joined in the original foreclosure, an appropriate decree against it would have been to either redeem or be barred of its right of redemption. The same decree is sought in this bill. Such a decree would not be a decree of strict foreclosure which is unknown to our practice (Browne v. Browne, 17 Fla. 607, 623, 35 Am. Rep. 96), because its effect would be, *not* to divest the mortgagor of a right to redeem the legal title and to vest it indefeasibly in the mortgagee-that title being already in the complainant by reason of its purchase at the foreclosure sale which was valid as against the mortgagor-but its effect would be merely to extinguish a junior lien to which the legal title already in the complainant is subject. Manhattan Bank v. Wamego Bank, 103 Kan. 865, 176 P. 658. Any defense to which the junior mortgagee would have been entitled, had it been joined in the original foreclosure, is open to it here. The form of the decree, whether requiring redemption or decreeing a foreclosure and sale, will abide the result of the defense interposed and maintained.

Since this complainant, purchaser at the foreclosure sale of the first mortgage, is entitled to maintain a suit de novo against the omitted second mortgagee, to foreclose its right of redemption, there remains for consideration the basis of payment by the second mortgagee in order to effect such redemption, in the event that course be properly decreed on final hearing.

[8] It is the well-established rule, to which there are some exceptions, however, that a junior incumbrancer, or a junior owner of a part only of mortgaged premises, must ***422** pay the whole amount of the mortgage debt in order to redeem. He cannot compel a redemption pro tanto, for the reason that the first mortgagee has not agreed to separate his debt and security into parts. He is entitled to payment of the whole. The junior incumbrancer redeems from the mortgage, not from the foreclosure sale to which he was not a party. Wiltsie Mortgage Foreclosure (4th Ed.) §§ 1054, 1071, 1088, 1145, and notes, 1199, 1209; Jones on Mortgages (8th Ed.) § 1372; 42 C. J. 400; ****694** Bradley v. Snyder, 14 Ill. 263, 58 Am. Dec. 564; Knowles v. Rablin, 20 Iowa, 101; Parker v. Child, 25 N. J. Eq. 41.

In a well-reasoned case from Wisconsin, Green v. Dixon, 9 Wis. 532, it is held as an exception to the rule just stated that *after foreclosure* a junior owner or incumbrancer who was not a party to the foreclosure of the senior mortgage is entitled to redeem from the senior mortgage upon paying such proportion of the mortgage debt as the value of the land covered by the second mortgage, or by the junior owner's deed, bears to the value of the entire mortgaged premises covered by the first mortgage. The reason assigned is that the purchaser, by electing to purchase under a defective foreclosure, subject to an

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outstanding junior interest of which he has actual or constructive notice, thereby elects to take an indefeasible estate in a part of the property and a defeasible estate in the other part covered by the junior mortgage, thus consenting to a separation of the two parts, so as to entitle the junior incumbrancer or owner to redeem his portion of the incumbered premises upon the proportionate basis just stated.

Other authorities, however, take the view that the general rule above stated applies to such a situation, so that the junior incumbrancer must pay the entire mortgage debt in order to redeem the premises in which he is interested, but when there are no intervening rights, he ***423** thereby becomes equitably subrogated to the original rights of the first mortgagee (42 C. J. 450), even as against the purchaser at the foreclosure sale, for such purchaser has elected to purchase under a defective foreclosure which does not affect the original right of the second mortgagee to redeem from the first mortgage. McGough v. Sweetser, 97 Ala. 361, 12 So. 162, 19 L. R. A. 470; Martin v. Fridley, 23 Minn. 13. See also Evans v. Kahr, 60 Kan. 719, 57 P. 950, 58 P. 467.

The view last stated has been heretofore definitely adopted by this court. In Key West Wharf Co. v. Porter, supra, a first mortgage had been foreclosed and the property purchased by a third party. Certain persons to whom the mortgagor had conveyed portions of the mortgaged premises were not made parties to the foreclosure. The purchaser subsequently brought suit to foreclose against these junior owners. The foreclosure of a second mortgage was also sought in the same suit. The defendants answered that they were willing and ready to redeem from the lien of the mortgage so much of the land as was claimed by them proportionate to the value of the whole, and that it was not just or equitable to impose upon them the payment of the entire indebtedness. In disposing of an exception to that portion of their answer, this court, speaking through Mr. Justice Taylor, held that there was no merit in the contention that there should be an ascertainment of the proportionate value of the portions of the land owned by the defendants and that they be allowed to redeem from the mortgagee by paying the proportionate value of their respective portions thereof. The court said: 'Their portions of said land, as well as all the residue of said mortgaged tract, are bound for the payment of the whole of both mortgages; and the courts have no power to release any part of the land from the lien of the mortgages by affixing thereto a sum, less than the entire sum of the mortgages, which, when paid, shall release ***424** such part from the lien of the mortgages. To redeem their portions of the land from these two mortgages, they [the junior owners of part of the mortgaged land] will be required to pay the whole amount due upon both mortgages.' In the respect under consideration, the situation of a junior mortgagee, holding a mortgage on part only of the premises embraced in the first mortgage, would be the same as that of a junior owner of part of the mortgaged premises. Manhattan Bank v. Wamego Bank, 103 Kan. 865, 176 P. 658.

[9] The rule just stated, however, that the junior mortgagee must pay the entire mortgage debt in order to redeem, is for the benefit of the senior mortgagee, and he or a purchaser at the foreclosure sale may waive the right to enforce redemption for the whole amount of the mortgage debt, and accept from one entitled to redeem a proportionate part of the debt, discharging the senior lien upon the portion so released. Wiltsie on Mortgage Foreclosure (4th Ed.) 1057, and cases cited; also sections 1066, 1071. This the complainant in this cause has done by offering to permit the junior mortgagee to redeem on the basis of the release clause in the first mortgage, which is permissible.

[10] This complainant cannot invoke this mode of redemption, however, to the exclusion of other modes to which the junior mortgagee may be entitled, nor to the exclusion of the potential equity of the junior mortgagee to seek a marshaling of securities. In other words, the complainant cannot compel the junior mortgagee to accept the waiver, in the absence of laches or estoppel on the part of the junior mortgagee. The mode of redemption prayed for by the complainant, however, is a permissible one under the facts alleged in this bill, which the junior mortgagee may accept or not at its election. If the junior mortgagee desires to avail itself of its right to redeem from the first mortgage by payment of the entire mortgage debt, thereby becoming ***425** equitably subrogated to all the rights of the first mortgagee, even as against this complainant, it may do so; but its election so to do must be asserted by its answer. Whether the junior mortgagee will insist upon other modes of redemption open to it is matter of defense. Likewise, as already stated, ****695** any equity in the junior mortgagee for a marshaling of security is matter of defense.

[11] It has not escaped notice that the complainant does not specifically offer to convey its title to the defendant upon the redemption by the latter from the first mortgage of the portion of the lands in which it is interested upon the basis prayed for in the bill. Though it would have been well to have made such an offer, it is not indispensable to the equity of the bill. Such a redemption, after foreclosure and sale, by the junior mortgagee, who is under no legal *obligation* to redeem, amounts not only to a redemption, but as against the purchaser who is complainant here, amounts to a purchase of the rights acquired by the purchaser at the sale under the senior mortgage. It is

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unnecessary therefore that complainant offer to convey, as such a redemption by the junior mortgagee would, by operation of law, invest in him indefeasibly the title of the purchaser at such sale. See McNutt v. Nuevo, 167 Cal. 459, 140 P. 6; Franklin v. Jamieson, 15 N. D. 613, 109 N. W. 56; Bristol v. Hershey, 7 Cal. App. 738, 95 P. 1040; Wemple v. Yosemite, 4 Cal. App. 78, 87 P. 280; Jones on Mortgages (8th Ed.), Sec. 1347. In order to make the decree fully effective, and in order to clear the title of its fective, and in order to clear the title of its present dilemma, it would be proper for the chancellor in his decree to require the complainant to convey to the defendant by special warranty deed upon redemption by the defendant in accordance with the decree, for the reason that the complainant purchased subject to the defendant's second mortgage, with constructive notice thereof, and subject to the right of redemption from the ***426** first mortgage, which mortgage has now been foreclosed as against the mortgagor, and this complainant has succeeded to the mortgagor's title rights by virtue of being a purchaser at the foreclosure sale. Therefore, if the defendant redeems as against this purchaser, he would not only require all the purchaser's rights by operation of law, but it would also be proper to decree a specific conveyance by such purchaser upon a proper redemption by the junior mortgagee.

The order overruling the demurrer is affirmed.

WHITFIELD, P. J., and BUFORD, J., concur.

TERRELL, C. J., and BROWN, J., concur in the opinion and judgment.

ELLIS, J., dissents.

ELLIS, J. (dissenting).

In November, 1924, Shoreland Company, a corporation, executed a mortgage to Bay View Estates Corporation to secure the payment of a debt of $1,150,000. The mortgage described many tracts of land numbered from 1 to 33, inclusive. The mortgage and notes were assigned by the Bay View Estates Corporation to the Bascayne Trust Company on May 9, 1925, which company on May 13, 1927, assigned them to the Third Mortgage Corporation.

Subsequently to the execution of the mortgage, the Miami Shores Company acquired title to the incumbered lands. This transaction occurred in March, 1925. On January 14, 1927, the Miami Shores Company executed to Quinn Plumbing Company, Inc., a corporation, a mortgage on lots numbered 10 to 14, inclusive, of block 25, Miami Shores, ***427** according to a plat recorded in the public records of Dade county, to secure a debt of $35,954.53 evidenced by five promissory notes. The property covered by this mortgage is included in tract numbered 23 of the original mortgage.

On May 14, 1927, the Third Mortgage Corporation began its suit against the Shoreland Company and Miami Shores Company to enforce the original mortgage and obtained a final decree on January 6, 1928. The Quinn Plumbing Company, Inc., the holder of the second mortgage on lots 10 to 14 of block 25, Miami Shores, was not made a party to the suit.

The property described in the original mortgage was sold under the decree of the court to the 'New Miami Shores Corporation' for the sum of $590,000. The amount decreed to be due to the Third Mortgage Corporation was $493,292.42 with interest as of December 22, 1927. The proceeds of the sale, after the payment of costs and expenses of the foreclosure proceeding, were applied upon the amount decreed to be due to the Third Mortgage Corporation, leaving a balance due to that corporation from Shoreland Company and Miami Shores Company in the sum of $88,520.51.

There appear to be some errors in the statement of this transaction as it appears in the bill of complaint in the instant case. The balance due the Third Mortgage Corporation should be $118,390.51; even then the 'costs and expenses of said foreclosure proceedings' seen to have amounted to the sum of $245,098.09.

In April, 1928, the New Miami Shores Corporation exhibited its bill in chancery in the circuit court for Dade county against Quinn Plumbing Company, Inc., in which the facts as stated in substance above were alleged, and in which the further allegation was made that the Shoreland ***428** Company mortgage contained a provision to the effect that the mortgagor should be entitled to secure the release and discharge of any of the property mortgaged from the lien of the mortgage 'upon payment to the Mortgagee of a standard partial release price upon the lots designated as per ****696** plats of said entire property; that said mortgage provides for the release of Lots 11 to 14, of Block 25, Miami Shores, upon the payment to the Mortgagee of the sum of $2,116.40, for each lot required or asked to be released, and the sum of $2,180.28 for the release of Lot 10, Block 25, Miami Shores.'

These lots constitute the property covered by the

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mortgage to the Quinn Plumbing Company, Inc., and constitute part of the south ½ of the southwest ¼ of the northwest ¼ of the southwest ¼ of section 6, township 53 S., range 42 E., which was subdivided into lots and blocks and with other lands so subdivided comprised the subdivision known as Miami Shores. To obtain a release from the Shoreland Company, mortgage of the lots covered by the mortgage to Quinn Plumbing Company, Inc., would require the payment to the mortgagee or its assigns in the original mortgage of the sum of $10,645.88. The special prayer of the bill in the instant case is that the Quinn Plumbing Company, Inc., be required to pay to the complainant that sum of money at 8 per cent. interest, and in default of such payment that the defendant and all persons claiming under it be barred and foreclosed of an from all right, title, and interest in and to the property described in said mortgage and every part thereof, which language refers to the property described in the Quinn Plumbing Company, Inc., mortgage. There is also a prayer for general relief and for summons in chancery.

The defendant demurred to the bill upon several grounds, which in substance were: First, there was no indebtedness ***429** due from the defendant to complainant; second, that the defendant was not a party to the foreclosure proceedings recited in the bill; third, that the allegations of the bill constituted no grounds for a foreclosure of the original mortgage on a portion only of the lands described therein as against the defendant; fourth, that the defendant never agreed to 'pay the indebtedness for which decree is sought'; and, fifth, that the complainant is not entitled to a foreclosure of the mortgage 'against the lands described in the bill of complaint.' The demurrer was overruled, and the Quinn Plumbing Company, Inc., appealed.

The complainant's theory seems to be that as purchaser of the property under the foreclosure sale it became subrogated to the rights under the Shoreland Company mortgage of the Third Mortgage Corporation which acquired the mortgage from the Biscayne Trust Company, which acquired it from the Bay View Estates Corporation the original mortgagee; that being subrogated to such rights it may compel the Quinn Plumbing Company to exercise its right of redemption from the lien of the first mortgage by paying to the complainant the sum which under the terms of the first mortgage the mortgagor would have been required to pay to the original mortgagee to redeem lots 10 to 14 of block 25 from the lien of the first mortgage.

The right to so redeem those lots was a right reserved to the mortgagor which was foreclosed in the suit to foreclose that mortgage. If the right ever existed in the junior mortgagee, the defendant in the instant case, it existed under the principal that by paying such sum to the original mortgagee the junior incumbrancer would be subrogated to the first mortgagee's lien upon the lots for a proportional part of that creditor's claim on the indebtedness against the mortgagor. So that by such redemption ***430** the junior lienor would hold a first lien upon the lots as security for the payment of the indebtedness to it plus a proportional part of the indebtedness held by the first mortgagee. But the right to redeem is to satisfy and remove the lien. The rights to foreclose and to redeem afford mutuality and neither can exist without the other. See Chaires v. Brady, 10 Fla. 133; Connor v. Connor, 59 Fla. 467, 52 So. 727.

So if the junior lienor had redeemed the lots from the lien held by the first mortgagee and been subrogated pro tanto to the first mortgagee's lien upon those lots, the mortgagor would still have had the right to redeem which would not have been effective from the it exercised the right of redemption from the lien of the second mortgage. But the right to redeem is optional in the junior mortgagee, and if he could have been compelled in equity by the first mortgagee to exercise that right, the Third Mortgage Company waived its right to compel such redemption by the foreclosure proceedings in which it did not make the junior mortgagee a party.

Now the purchaser of the premises at the foreclosure sale, the complainant in this case, acquired only such title and rights as the mortgagor and its grantee had and became subrogated to the rights of the first mortgagee to perfect any errors which may have rendered the foreclosure proceedings void or voidable. In such case a purchaser becomes an equitable assignee of the mortgage and of the debt it secured where, at the sale, he paid the full amount due on the decree of foreclosure. See 25 R. C. L. 1357.

The right which the mortgagor had before foreclosure of the first mortgage is the right to redeem the land from the lien of the junior mortgage, but that is not what the bill seeks. It seeks to compel the junior lienor to redeem the land from the lien of the first mortgage which has become ***431** merged in the title acquired by the purchaser. If the junior lienor redeems the land, from what does he redeem it? It is not the theory of the bill that by paying such sum to the complainant the latter is divested of title to the land which becomes ****697** vested in the defendant, nor is there any offer to convey the title to the defendant in such case which, if it could affect the complainant's right at all, it would be the part of equity to do.

The failure of the Third Mortgage Corporation to make the Quinn Plumbing Company, Inc., a party in the foreclosure proceedings was its own error which entailed no liability upon the defendant in this case. The purchaser at the foreclosure sale had constructive notice of the

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existence of the second mortgage and was charged with notice that the holder of it was not made a party to the proceedings. It was not a necessary party, it is true, but by making it a party some inconvenience could have been avoided.

A second incumbrancer, who is not made a party to foreclosure proceedings in the enforcement of a prior mortgage, is only affected and can only complain when there is a surplus of proceeds from the foreclosure sale after paying the prior lien. His right to the surplus cannot with propriety arise until it shall be ascertained that there is a surplus, and this cannot be shown before the mortgaged premises have been sold and the debt of the prior incumbrancer with all costs fuly discharged. See Wilson & Herr v. Hayward, 6 Fla. 171; Ritch v. Eichelberger, 13 Fla. 169.

Obviously, if the proceeds of the sale were more than sufficient to pay the prior debt and costs or the property sold subject to the second mortgage, the holder of the second lien would be required to pay nothing in order to redeem.

The rule is very general in the United States that a junior mortgagee is not a necessary party to a foreclosure ***432** proceeding of a real estate mortgage so far as the jurisdiction of the court to render a decree of foreclosure binding upon all parties to the proceedings is concerned. He is, however, a necessary party in order to foreclose and bar any right of redemption he has in the property by virtue of his lien, and unless made a party his rights are generally not affected by a decree of foreclosure and sale thereunder. See Jones v. Williams, 155 N. C. 179, 71 S. E. 222, 36 L. R. A. (N. S.) 426, note; 19 R. C. L. p. 530.

Under the rule generally obtaining, the purchaser at a foreclosure sale, in a proceeding to enforce a prior mortgage when the junior incumbrancer was not made a party, takes the title subject to the lien of the junior incumbrancer. Jones v. Williams, supra.

In Florida, however, the doctrine was early announced that the second incumbrancer is only affected and can only complain where there is a surplus after paying prior liens.

If the second mortgagee had desired to redeem the property covered by its mortgage from the lien of the first, it would seem under the circumstances of the transaction that it might have done so by paying that proportion of the mortgage debt remaining due at the time of such redemption which the value of the property covered by the junior lien bore to all the property covered by the first mortgage. The equities of the case would seem to require the application of the more liberal rule of redemption. See Sutherland v. Tyner, 72 Iowa, 232, 33 N. W. 645.

The appellee contends that its bill in this case is one for a strict foreclosure of the second mortgage held by the Quinn Plumbing Company, Inc.; that as the foreclosure proceedings of the first mortgage were irregular, imperfect, or void, the complainant, the purchaser of the property, became subrogated to the rights of the original mortgagee; that it became thereby virtually an equitable assignee of ***433** the first mortgage and of the debt it secured. See Jordan v. Sayre, 29 Fla. 100, 10 So. 823; Key West Wharf & Coal Co. v. Porter, 63 Fla. 448, 58 So. 599, Ann. Cas. 1914A, 173; Crystal River Lumber Co. v. Knight Turpentine Co., 69 Fla. 288, 67 So. 974, Ann. Cas. 1917D, 574; Meyer v. Florida Home Finders, 90 Fla. 128, 105 So. 267.

Assuming that the failure to join the junior incumbrancer as a defendant in the foreclosure proceedings of the first mortgage was such an imperfect or irregular proceeding as to subrogate the purchaser at the sale to the rights of the first mortgagee, the action cannot be a bill to foreclose the first mortgage as against the lien of the second unless the owner of the title to the property is made a party defendant. As the owner of the title is the complainant, it would be an action to foreclose the mortgage against itself, which would be in effect a suit to compel redemption of the second mortgage. The doctrine of strict foreclosure of a mortgage does not obtain in this state. The doctrine rests upon the theory that the mortgagee being vested with the title to the land subject to defeasance may compel the mortgagor to redeem, or in default the title to the property becomes absolute in the mortgagee. It was a doctrine which originated in the reign of Charles I by which mortgagees asked to be relieved of the *mortgagor's* equity of redemption. In this country, however, it has long since fallen into disuse, and in some states it was never used. See Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221; Davis v. Holmes, 55 Mo. 349.

Assuming that the purchaser of the property at the foreclosure sale may maintain an action to compel the junior mortgagee to redeem the property from the lien of the first mortgage, the basis upon which such redemption may be accomplished is not properly laid in the bill upon which the relief is sought.

***434 **698** We are not unmindful of the general rule that a junior mortgagee of a party of the mortgaged premises may redeem only on payment of the entire mortgage indebtedness. The property covered by the junior mortgage in extent and likewise probably in value constituted an inconsiderable portion of the entire estate. The debt due to the junior incumbrancer was less than a

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thirty-second part of the debt due to the first incumbrancer and less than one-thirteenth of the balance found to be due by the chancellor in the foreclosure proceedings.

Although the property brought nearly $97,000 more than enough to pay the balance due, that amount and approximately $148,300 more were expended in the payment of 'costs and expenses of said foreclosure proceedings.' If the junior incumbrancer had been made a party to the proceedings, it would have had the right to question the apparently extravagant allowances for 'costs and expenses' and may have succeeded in showing that a sufficient surplus existed from the proceeds of the sale to pay a considerable portion of his claim.

In view of these circumstances, I think the bill is without equity and that the demurrer should have been sustained.

All Citations

100 Fla. 413, 129 So. 690, 73 A.L.R. 600

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155 So.3d 411
District Court of Appeal of Florida,
First District.

WELLS FARGO BANK, N.A., Appellant,
v.
Michelle A. GIESEL, et al., Appellees.

No. 1D13–3336.
|
Dec. 31, 2014.

Synopsis

Background: Mortgagee brought foreclosure action, and after entry of foreclosure judgment and judicial sale, moved to vacate the final judgment to allow mortgagee to reform the mortgage to reflect the correct legal description. The Circuit Court, Alachua County, Mary Day Coker, J., granted the motion to vacate, and dismissed the action. Mortgagee appealed.

Holding: The District Court of Appeal, First District, Wetherell, J., held that the Circuit Court's dismissal deprived mortgagee of due process.

Reversed and remanded.

Van Nortwick, J., filed dissenting opinion.

West Headnotes (1)

[1] **Constitutional Law**
Enforcement; proceedings
Mortgages
Opening or vacating judgment or decree

With regard to mortgagee's motion to vacate foreclosure judgment to allow it to reform mortgage to reflect the correct legal description, trial court's dismissal based on a generic request for "further relief that is appropriate" in the "wherefore clause" in mortgagee's motion to vacate, deprived mortgagee of due process; the mortgagee did not request dismissal, and if the court had done as the mortgagee asked, the parties would have been put back in their pre-judgment positions, and mortgagee could have filed a motion to reform the mortgage to correct the legal description. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

Attorneys and Law Firms

***411** Angela L. Leiner, Douglas C. Zahm, and Douglas M. Bales, St. Petersberg, for Appellant.

No appearance, for Appellees.

Opinion

WETHERELL, J.

Wells Fargo Bank, N.A. (the bank) appeals the order dismissing this foreclosure action in response to its motion to vacate the final judgment, the judicial sale, and the certificates of sale and title. Because dismissal was not requested by the bank or required under the circumstances of this case, we reverse and remand for further proceedings.

This case started out as a run-of-the-mill foreclosure action. The bank filed a complaint to foreclose the mortgage securing the promissory note executed by Appellees (the borrowers) after the borrowers failed to make the payments required by the note. After languishing for several years, the case proceeded to a non-jury trial and culminated in a final judgment of foreclosure in favor of the bank.[1] The judgment was not appealed. The bank purchased the property at the judicial sale and the trial court thereafter issued certificates of sale and title to the bank.

The case took an unusual turn when, eight months after the certificate of title was issued (and nine months after the final judgment was entered), the bank filed a ***412** motion pursuant to Florida Rule of Civil Procedure 1.540(b) to vacate the final judgment, the judicial sale, and the certificates of sale and title. The basis for the motion was that the mortgage contained an erroneous legal description that was carried into the final judgment, the notice of sale, and the certificates of sale and title. The motion explained that vacating the final judgment and the subsequent actions

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"is necessary to allow the [bank] to reform the Mortgage ... and to foreclosure [sic] the Property with the correct legal description." The motion closed with a generic "wherefore clause" asking the court to enter an order granting the motion "and for such other the [sic] further relief that is appropriate."

The borrowers did not file a response to the motion and the trial court did not hold a hearing on the motion. The court disposed of the motion in the following order:

> ***ORDER DISMISSING CASE,*** ORDER ON MOTION TO VACATE JUDICIAL SALE, CERTIFICATE OF SALE, CERTIFICATE OF TITLE, AND FINAL JUDGMENT OF FORECLOSURE
>
> THIS CAUSE came on for consideration of [the bank]'s Motion to Vacate Judicial Sale, Certificate of Sale, Certificate of Title and Final Judgment of Foreclosure. The Court having reviewed the court file and pleadings filed by the [bank], it is
>
> ORDERED AND ADJUDGED
>
> 1. The Foreclosure Sale held in this action is hereby vacated.
>
> 2. The Certificate of Sale is [sic] in this action is hereby vacated.
>
> 3. The Certificate of Title issued and recorded on October 3, 2012 is hereby vacated.
>
> 4. That the Final Judgment entered on August 2, 2012 is hereby vacated.
>
> ***5. This Action is Dismissed, without prejudice.***

The bold-italicized portions of the order were handwritten by the trial court. The remainder of the order was the typewritten proposed order submitted by the bank with its motion.

The bank timely filed a motion for rehearing challenging the *sua sponte* dismissal of the case. The motion explained that the bank "did not seek dismissal of the action" and pointed out that "the Court gave no findings as to why it felt the dismissal of the action was an appropriate remedy." The trial court summarily denied the motion. This appeal followed.[2]

The bank argues on appeal that it was denied due process by the trial court's *sua sponte* dismissal of the case. We agree. The bank did not request such relief in its motion, and contrary to the dissent's contention, the generic request for "further relief that is appropriate" in the "wherefore clause" in the bank's motion did not give the trial court authority to dismiss this action without at least affording the bank notice and an opportunity to be ***413** heard on the issue. *See BAC Home Loans Servicing, Inc. v. Headley,* 130 So.3d 703, 706 (Fla. 3d DCA 2013) (rejecting "tipsy coachman" argument that judgment for defendants on their counterclaim in a foreclosure action could be affirmed based upon the "wherefore clause" in the counterclaim seeking "such other relief as the court deems just and proper under the circumstance" because that clause did not provide the lender meaningful notice that the defendants were seeking the form of relief ultimately granted by the court); *and cf. Liton Lighting v. Platinum Television Grp., Inc.,* 2 So.3d 366, 367 (Fla. 4th DCA 2008) ("When a trial judge *sua sponte* dismisses a cause of action on grounds not pleaded, the trial judge denies the parties due process because the claim is being dismissed without notice and an opportunity for the parties and counsel to be heard.") (internal quotations omitted).

Moreover, on the merits, we conclude that dismissal was not required under the circumstances of this case and, thus, the dismissal of "[t]his action" ordered by the trial court cannot be justified as "further appropriate relief" in any event. The dissent's reliance on *Lucas v. Barnett Bank of Lee County,* 705 So.2d 115 (Fla. 2d DCA 1998), and *Fisher v. Villamil,* 62 Fla. 472, 56 So. 559 (1911), in support of the contrary conclusion is misplaced.

Lucas involved an effort to reform the legal description in a foreclosure deed in a *separate proceeding* after the foreclosure sale. *See* 705 So.2d at 115. The court held that the deed could not be reformed in this manner because the sale was premised upon the erroneous legal description and other potential bidders may have acted in reliance on that description. *Id.* at 116. The court explained that the legal description must be corrected before the foreclosure judgment and not in a subsequent separate action. *Id.* ("If ... the mistaken legal description is not corrected before final judgment of foreclosure, and the mistake is carried into the advertisement for sale and the foreclosure deed, a court cannot reform the mistake in the deed and judgment; rather, the foreclosure process must begin anew."). The court explained that the proper procedure is to vacate the sale and set aside the foreclosure judgment so as to return the parties to their "original status," whereupon the bank could then seek to reform the legal description in the mortgage and foreclose based upon the revised legal description. *Id.* The case said nothing about dismissal of the original foreclosure case being required.

The 1911 *Fisher* case cited in *Lucas* for the proposition that "the foreclosure process must begin anew" was likewise a separate, post-sale effort to reform the legal

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description in a foreclosure deed. *See* 56 So. at 561. *Fisher* said nothing about the dismissal of the foreclosure case being required; it simply held that an erroneous legal description in a mortgage cannot be corrected by reforming the deed resulting from the foreclosure sale. *Id.* There is nothing in *Fisher* (or *Lucas*) that precludes the reformation of the mortgage from occurring in the original foreclosure proceeding once the judgment and resulting certificates are set aside. Indeed, that appears to be precisely what happened in *Fisher* on remand. *See Fisher v. Villamil*, 65 Fla. 488, 62 So. 481 (1913) (affirming decree entered on remand cancelling the deed and then reforming and foreclosing the mortgage, and rejecting argument that the "amended bill" filed on remand "ma[d]e an entirely new case").

Here, the bank was not asking the trial court to do what *Lucas* and *Fisher* prohibit: reform the legal description in the certificate of title resulting from the foreclosure sale. Instead, the bank was asking ***414** the court to do precisely what *Lucas* and *Fisher* contemplate: vacate the final judgment of foreclosure, the sale, and the certificates of sale and title, so the bank could reform the mortgage. Had the trial court simply granted the relief requested in bank's motion (without adding the dismissal language to the order), the parties would have been put back into their pre-judgment positions, whereupon the bank could have filed a motion to amend the original complaint to include a count to reform the mortgage to correct a legal description and then the case could have proceeded on the amended complaint. The borrowers would not be prejudiced by this procedure because they will have an opportunity to defend against the amended complaint (if they choose to do so[3]), and this procedure will also avoid the problems outlined by the bank in its brief that would result if it was required to initiate an entirely new case to foreclose the borrowers' mortgage.

We recognize that the bank brought these problems on itself by including an incorrect legal description in the mortgage. However, once the bank became aware of the error, it acted diligently to undo what had already been done in order to return the case to its pre-judgment posture so that it could reform the mortgage and restart the foreclosure process as contemplated by *Lucas* and *Fisher*. There is simply no reason that the bank should be required to initiate an entirely new action to achieve this result when it would have sufficed for the trial court to simply vacate the foreclosure judgment and the resulting certificates (as requested by the bank) and then allow the litigation to proceed in the existing case.

Accordingly, for the reasons stated above, we reverse the portion of the challenged order dismissing "[t]his action" and we remand for further proceedings consistent with this opinion.

REVERSED and REMANDED for further proceedings.

MAKAR, J., concurs; VAN NORTWICK, J., dissents with opinion.

VAN NORTWICK, J., dissenting.

I respectfully dissent from the reversal of the trial court's order that, *inter alia*, dismissed Wells Fargo's foreclosure action without prejudice. In my view, governing Florida case law requires affirmance.

In *Lucas v. Barnett Bank of Lee County*, 705 So.2d 115, 115 (Fla. 2d DCA 1998), the Second District reviewed a final summary judgment that modified "a legal description in a mortgage, partial release of security agreement, and certificate of title," when the mortgagor had previously obtained a final judgment of foreclosure and purchased the subject property at a foreclosure sale. The appealed modified judgment sought to correct an erroneous legal description of the subject property that was utilized in the original foreclosure judgment and related documents. *Id.*

Of particular importance for purposes of the disposition of the case under review, the court observed:

> When a mortgage contains an incorrect legal description, a court may correct the mistake before foreclosure. If, however, the mistaken legal description is not corrected before final judgment of foreclosure, and the mistake is carried into the advertisement for sale and the foreclosure deed, a court cannot reform the mistake in the deed and judgment; ***415** rather, the foreclosure process must begin anew. *Fisher v. Villamil*, 62 Fla. 472, 56 So. 559 (1911). The reason behind this policy is that, if the mortgage is not reforeclosed, the purchaser would have obtained title to a property that was not properly ordered for sale, advertised, or sold. While the mortgagee who bid its

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> mortgage at the sale might have understood exactly what property was being offered, other potential bidders at the sale might not have had the same understanding. 62 Fla. at 479, 56 So. at 561. As the *Fisher* court noted, the mortgage may be reformed if a sufficient showing is made, and the reformed mortgage may be foreclosed. But first, the deed to the property must be canceled, and the original foreclosure judgment set aside, such that the parties are returned to their original status. 62 Fla. at 480, 56 So. at 561; *cf.* § 702.08, Fla. Stat. (1993).

Id. at 116. Applying the above rule, the Second District reversed the summary judgment reforming the mortgage and related documents. *Id.*

The majority characterizes *Fisher* and *Lucas* as requiring that the parties should be returned to their pre-judgment, post-pleading positions. Respectfully, the majority misreads these cases. In my mind, the key proposition to be gleaned from both *Fisher* and *Lucas* is that a mistake in the legal description of a foreclosed property cannot be corrected or reformed if the mistake is not corrected prior to entry of final judgment of foreclosure and that, in such a situation, "the foreclosure process must begin anew." *Id.* Importantly, this proscription is not limited in application to cases in which a separate proceeding seeks to reform an erroneously described property after final judgment of foreclosure. It is not apparent to me why the holding from *Fisher* and *Lucas* should not be applied where, as here, a party files a post-judgment motion in the foreclosure case seeking to correct an erroneous legal description.

Returning to the plain language from the case law, "begin anew" is commonly and reasonably understood to mean to re-start from the beginning. Because this case began with the filing of a foreclosure complaint, it seems logical that in order to "begin anew," the bank would be required to file a new complaint with a correct legal description of the subject real property. Recasting the parties to the positions they occupied at any other point ignores, in my opinion, the plain language from *Fisher* and *Lucas*.

Here, Wells Fargo did not seek reformation of the incorrect legal description prior to the entry of the final judgment of foreclosure. Although by dismissing the case the trial court took action that was not specifically requested by Wells Fargo, the appealed order did grant the relief the bank requested, i.e., vacating the erroneous judgment and other papers. The trial court's *sua sponte* action, furthermore, could reasonably be interpreted as "such other the [sic] further relief that is appropriate," as requested in Wells Fargo's motion to vacate. Because the appealed order stemmed from Wells Fargo's own motion to vacate, the present case is distinguishable from cases such as *BAC Home Loans Servicing, Inc. v. Headley*, 130 So.3d 703 (Fla. 3d DCA 2013), where unrequested relief was inappropriately granted against a non-pleading party.

In my view, the trial court was correct in dismissing the entire action and returning the parties "to their original status," which I perceive to be the statuses they maintained before the case was initiated, because "the legal description [did] not close, and consequently it does not ***416** describe an actual parcel of real estate." *Lucas*, 705 So.2d at 115–16.

Finally, I recognize that allowing Wells Fargo to file an amended complaint with a correct legal description, as opposed to filing an entirely new complaint, would allow the bank to avoid some potential complications outlined in the answer brief. However, Wells Fargo would not be confronted with any foreclosure-related complications if it had simply used the correct legal description in its original filings. Put another way, Wells Fargo's error led to the current state of affairs, yet it now wants to be relieved of responsibility for its error. In spite of whatever complications could arise upon the filing anew of a foreclosure complaint, because the dismissal was without prejudice, the way remains open for Wells Fargo to correct the error that derailed the original foreclosure litigation.

Accordingly, I respectfully dissent.

All Citations

155 So.3d 411, 40 Fla. L. Weekly D88

Footnotes

1 The foreclosure complaint was filed in December 2009 and only one of the three borrowers (Michelle Giesel) filed an answer. A default was entered against the other two borrowers (James and Marilyn Giesel) in February 2010. There was very little record activity in the case over the next eight months, and there was no record activity whatsoever between

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October 2010 and June 2012. The final judgment was entered in August 2012.

2 We have jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(A); ***Wells Fargo Bank, N.A.*** *v. Chatham,* 114 So.3d 1062, 1064 (Fla. 1st DCA 2013) ("The dismissal order is a final order for purposes of appellate review because, even though it dismissed this case 'without prejudice,' the order precluded **Wells Fargo** from refiling a complaint under the same case number."); *Martinez v. Collier Cnty. Pub. Sch.,* 804 So.2d 559, 560 (Fla. 1st DCA 2002) ("Dismissal without prejudice is final if its effect is to bring an end to judicial labor."); *Carlton v. Wal–Mart Stores, Inc.,* 621 So.2d 451, 452 (Fla. 1st DCA 1993) ("While the dismissal is 'without prejudice,' it is clear that it is 'without prejudice' to file another, separate, action, rather than 'without prejudice' to file an amended complaint in the first action. We believe that, because the dismissal ends the judicial labor in the first action, the dismissal is sufficiently 'final' to permit an appeal.").

3 This seems unlikely because two of borrowers were defaulted when they did not respond to the original complaint, and none of the borrowers appealed the final judgment of foreclosure or participated in this appeal.

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162 So.3d 159
District Court of Appeal of Florida,
Fourth District.

Heather **EPSTEIN**, Appellant,
v.
BANK OF **AMERICA**, National Association, as Successor by Merger to LaSalle Bank National Association, as Trustee Under the Securitization Servicing Agreement Dated July 1, 2004 Structured Asset Securities Corporation Structured Asset Investment Loan Trust Mortgage Passthrough Certificates, Series 2004–7, Appellee.

No. 4D13–4066.
|
Jan. 28, 2015.
|
Rehearing En Banc Denied May 6, 2015.

Synopsis
Background: Three years after entry of a final summary judgment of foreclosure, sale, and certificate of title, mortgagee moved to vacate so it could amend the complaint to add a reformation count. The Circuit Court for the Seventeenth Judicial Circuit, Broward County, Joel T. Lazarus, J., granted mortgagee's motion, and homeowner appealed.

Holdings: The District Court of Appeal, Conner, J., held that:

[1] final summary judgment of foreclosure was voidable, not void, and thus, one-year time limit for vacating a judgment applied to mortgagee's motion to vacate, and

[2] one-year time limit for vacating a voidable foreclosure judgment began to run on the date judgment was entered.

Reversed and remanded.

West Headnotes (6)

[1] **Mortgages**
Opening or vacating judgment or decree

A final summary judgment of foreclosure based on a mortgage that contained an incorrect legal description was "voidable," not "void," and thus, the one-year time limit for vacating a judgment applied to mortgagee's motion to vacate, absent any evidence that there was an owner of the described property other than the owner listed in complaint, or that the property, as described in the mortgage and judgment, even existed. West's F.S.A. RCP Rule 1.540(b)(1).

1 Cases that cite this headnote

[2] **Appeal and Error**
Vacating Judgment or Order

An appellate court reviews an order on a motion for relief from judgment under an abuse of discretion standard. West's F.S.A. RCP Rule 1.540(b).

Cases that cite this headnote

[3] **Mortgages**
Opening or vacating judgment or decree

The one-year time limit for vacating a voidable foreclosure judgment on the basis the mortgage contained an incorrect legal description began to run on the date the judgment was entered. West's F.S.A. RCP Rule 1.540(b)(1).

1 Cases that cite this headnote

[4] **Judgment**
Invalid or unauthorized judgments
Judgment
Objections based on irregularities

If a judgment is void then it can be attacked at any time, but if it is only voidable then it must be attacked within a year of entry of the judgment. West's F.S.A. RCP Rule 1.540(b).

Cases that cite this headnote

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[5] **Constitutional Law**
Persons Entitled to Raise Constitutional Questions; Standing
Constitutional Law
Third-party standing in general

Constitutional rights are personal and may not be asserted vicariously; this also holds true specifically for due process challenges. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[6] **Mortgages**
Scope and Extent of Relief
Mortgages
Amendment or modification of judgment or decree

When a mortgage contains an incorrect legal description, a court may correct the mistake before foreclosure; if, however, the mistaken legal description is not corrected before final judgment of foreclosure, and the mistake is carried into the advertisement for sale and the foreclosure deed, a court cannot reform the mistake in the deed and judgment, but rather, the foreclosure process must begin anew.

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

CONNER, J.

The homeowner appeals the trial court's order granting the bank's motion to vacate the final summary judgment of foreclosure, sale, and certificate of title. The homeowner argues that the trial court erred in granting the motion filed over three years after the final summary judgment was entered. We agree and reverse.

Factual Background and Trial Court Proceedings

The problem began when the mortgage was signed using an incorrect legal description for the real property. Subsequently, the bank filed a foreclosure complaint. In December 2009, a final summary judgment of foreclosure was entered using the incorrect legal description. The foreclosure sale was conducted the following August with the bank as the highest bidder. Shortly thereafter, a certificate of title containing the incorrect legal description was issued to the bank.

Two years later, in September 2012, the bank filed its first motion to vacate the final summary judgment, sale, and certificate of title. The motion was filed pursuant to Florida Rule of Civil Procedure 1.540(b)(1), alleging that, "due to an inadvertent mistake," the legal description of the property in the mortgage was incorrect, and therefore, the bank needed to amend the complaint to add a reformation count. It also alleged that the incorrect legal description in the foreclosure judgment prevented the bank from obtaining clear title to the property. In October 2012, the trial court entered an order denying the bank's motion, "without prejudice."

In January 2013, the bank filed its second motion to vacate. This second motion was also filed pursuant to Florida Rule of Civil Procedure 1.540(b)(1), but, additionally, pursuant to rule 1.540(b)(4), on the added grounds that the final judgment was void. In this motion, the bank admitted that it was made aware of the error in the legal description in the mortgage and final judgment in October 2010, ten months after the judgment was entered. The motion alleged that the error in the legal description in the final judgment was clouding the title to property owned by a third party.

A hearing was held on the bank's second motion. At the hearing, the homeowner objected to the bank's second motion, arguing that the trial court did not have jurisdiction to hear the motion because rule 1.540(b)(1) has a one-year time limit for vacating a judgment, and the bank's motion was filed more than a year after ***161** the judgment was entered. The bank renewed its argument that the incorrect

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legal description rendered the judgment void, making the one-year time limitation inapplicable. The trial court granted the bank's second motion. This appeal follows.

Appellate Analysis and Disposition

[1] [2] [3] "An appellate court reviews an order on a rule 1.540(b) motion for relief from judgment under an abuse of discretion standard." *Phadael v. Deutsche Bank Trust Co. Ams.*, 83 So.3d 893, 894 (Fla. 4th DCA 2012).

[4] "If a judgment is 'void' then under rule 1.540(b) it can be attacked at any time, but if it is only 'voidable' then it must be attacked within a year of entry of the judgment." *Condo. Ass'n of La Mer Estates, Inc. v. Bank of New York Mellon Corp.*, 137 So.3d 396, 398 (Fla. 4th DCA 2014) Thus, the determining factor in this case is whether the final judgment was void due to an error in the legal description in the mortgage and judgment.

Regarding the difference between judgments that are void and those that are voidable, we have explained:

> Florida courts have long drawn a distinction between a "void" judgment and a "voidable" judgment. A void judgment is one entered in the absence of the court's jurisdiction over the subject matter or the person. *See, e.g., Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n,* 968 So.2d 658, 665 (Fla. 2d DCA 2007); *Palmer v. Palmer,* 479 So.2d 221, 221 (Fla. 5th DCA 1985) ("If a court has subject matter jurisdiction and that jurisdiction has been properly invoked by pleadings and properly perfected by service of process, its judgments, although erroneous as to law or fact and subject to reversal on appeal, are nevertheless not void.").

Miller v. Preefer, 1 So.3d 1278, 1282 (Fla. 4th DCA 2009). "In contrast, a voidable judgment is a judgment that has been entered based upon some error in procedure that allows a party to have the judgment vacated, but the judgment has legal force and effect unless and until it is vacated." *Zitani v. Reed*, 992 So.2d 403, 409 (Fla. 2d DCA 2008) (citing *Sterling Factors*, 968 So.2d at 665)).

The bank argues that the judgment was void "because the owner of the property identified in the judgment was not made a party to the underlying case." To support this contention, the bank cites to *Community Federal Savings & Loan Ass'n of the Palm Beaches v. Wright,* 452 So.2d 638 (Fla. 4th DCA 1984). In *Wright*, the guardian for a minor, and not the minor himself, was the only defendant in a foreclosure action against the *minor's* property. *Id.* at 640. After the foreclosure, when he was evicted from the home, the minor was first made aware of the foreclosure and brought a motion under rule 1.540 to vacate the default judgment. *Id.* The trial court entered an order vacating the default judgment, and this court affirmed, stating that "[i]t is well established that in an action to foreclose a mortgage the owner of the fee simple title is an indispensable party." *Id.* Since the minor, as owner of the property, was never made a party to the foreclosure action, the judgment of foreclosure was void. *Id.* at 641.

[5] The bank argues that the instant case is similar to *Wright*, and that the final summary judgment in this case is void because the due process rights of the owner of the described property in the mortgage and judgment were violated in that the actual owner was never made a party to the action. However, there are two problems with the argument. First, there is no evidence in the record that there *is* an owner of the described property other ***162** than the homeowner named in the complaint, or that the property, as described in the mortgage and judgment, even exists.[1] Second, if the property described in the mortgage and final judgment does exist, and if there is an owner of the property other than the homeowner named in the complaint, *that owner* was not the party challenging the final summary judgment. "[C]onstitutional rights are personal and may not be asserted vicariously." *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). This also holds true specifically for due process challenges. *See State v. Muller*, 693 So.2d 976, 978 (Fla.1997) (holding that a defendant lacked standing to challenge a violation of the due process rights of the non-defendant owners of a vehicle). Therefore, the due process argument that the judgment is void is not applicable in this case.[2]

[6] Although not cited by either party, we agree with the analysis of the Second District regarding the authority of the court to correct errors in the legal descriptions in mortgages and foreclosure judgments:

> When a mortgage contains an incorrect legal description, a court may correct the mistake before foreclosure. If, however, the mistaken legal description is not corrected before final judgment of foreclosure, and the mistake is carried into the advertisement for sale and the foreclosure deed, a court cannot reform the mistake in the deed and judgment; rather, the foreclosure process must begin anew.

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Lucas v. Barnett Bank of Lee Cnty., 705 So.2d 115, 116 (Fla. 2d DCA 1998) (citing *Fisher v. Villamil*, 62 Fla. 472, 56 So. 559 (1911)). As the Second District noted, "[w]hile the mortgagee who bid its mortgage at the sale might have understood exactly what property was being offered, other potential bidders at the sale might not have had the same understanding." *Id.*

As to the named parties in this proceeding, there is no issue of subject matter jurisdiction or personal jurisdiction. We therefore determine that the final summary judgment was voidable, not void, and the bank's motion to vacate was time-barred under rule 1.540(b).

Reversed and remanded.

CIKLIN and FORST, JJ., concur.

All Citations

162 So.3d 159, 40 Fla. L. Weekly D293

Footnotes

1 The legal description in the final judgment indicates the mortgage lien applied to a portion of a platted subdivision lot, using a metes and bounds description. It is unclear from the record whether the problem with the legal description is that the metes and bounds description does not close or some other problem.

2 For the same reason, the bank's reliance on *Hutchison v. Chase Manhattan Bank*, 922 So.2d 311 (Fla. 2d DCA 2006), is misplaced. There, the appellant was a third party owner, who was not a party to the suit, contesting the foreclosure sale.

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114 So.3d 924
Supreme Court of Florida.

CITY OF **PALM BAY**, Appellant,
v.
WELLS FARGO BANK, N.A., Appellee.

No. SC11–830.
|
May 16, 2013.

Synopsis

Background: Bank brought foreclosure action against owner of property in city, and named city as party due to existence of city code enforcement liens on property that were recorded after bank's mortgage interest was recorded. The Circuit Court, Brevard County, Bruce W. Jacobus, J., granted bank's summary judgment motion. City appealed. The District Court of Appeal, 57 So.3d 226, Cohen, J., affirmed, and certified question as to whether a municipal ordinance may validly establish superpriority status for municipal code enforcement liens.

[Holding:] The Supreme Court, Canady, J., held that city ordinance that established a superpriority status for municipal code enforcement liens was both inconsistent with, and in direct conflict with, the general statutory scheme for priority of rights with respect to interests in real property created by the legislature, and thus, invalid.

Certified question answered in the negative.

Perry, J., filed dissenting opinion, in which Pariente, J., concurred.

West Headnotes (3)

[1] **Municipal Corporations**
Imposition of liabilities in general

City ordinance that established a superpriority status for municipal code enforcement liens was both inconsistent with, and in direct conflict with, the general statutory scheme for priority of rights with respect to interests in real property created by the legislature, and thus, was invalid; giving effect to the ordinance's superpriority provision would allow a municipality to displace the policy judgment reflected by the legislature, and allow the municipality to destroy property rights established by state law. West's F.S.A. Const. Art. 8, § 2(b); West's F.S.A. §§ 166.021, 695.01(1).

3 Cases that cite this headnote

[2] **Municipal Corporations**
Conformity to constitutional and statutory provisions in general

Municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute; when a municipal ordinance flies in the face of state law, that is, cannot be reconciled with state law, the ordinance cannot be sustained. West's F.S.A. Const. Art. 8, § 2(b).

3 Cases that cite this headnote

[3] **Municipal Corporations**
Conformity to constitutional and statutory provisions in general

Although municipalities generally have the power to enact legislation concerning any subject matter upon which the state Legislature may act, in exercising their power within that scope municipalities are precluded from taking any action that conflicts with a state statute. West's F.S.A. § 166.021(3).

3 Cases that cite this headnote

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Opinion

CANADY, J.

In this case we consider whether a municipal ordinance may validly establish superpriority status for municipal code enforcement liens. In *City of Palm Bay v. Wells Fargo Bank, N.A.*, 57 So.3d 226 (Fla. 5th DCA 2011), the Fifth District Court of Appeal concluded that such an ordinance superpriority provision is invalid because it conflicts with a state statute and that the City's lien accordingly did not have priority over the lien of Wells Fargo's mortgage that was recorded before the City's lien was recorded. Palm Bay sought review, and we accepted jurisdiction based on the Fifth District's certification of the following question of great public importance:

> Whether under Article VIII, section 2(b), Florida Constitution, section 166.021, Florida Statutes and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to a code enforcement board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages?

City of Palm Bay v. Wells Fargo Bank, N.A., 67 So.3d 271, 271 (Fla. 5th DCA 2011) (mem.).

On appeal, the City argues that the ordinance superpriority provision is within the "broad home rule powers" of the City. Petitioner's Brief on the Merits at 5, *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So.3d 924, 2013 WL 2096257 (Fla.2013). The City contends that because the Legislature has made certain exceptions to the general rules governing the priority of liens, municipalities have the power to likewise make exceptions. For the reasons we explain, we conclude that the Fifth District correctly decided that the ordinance superpriority provision is invalid. Accordingly, we answer the certified question in the negative. Before explaining our conclusion, we will review the pertinent provisions of the Palm Bay ordinance, the constitutional and statutory provisions relevant to the City's exercise of power, and the statutory framework governing the priority of interests based on recorded instruments.

I. BACKGROUND

City of Palm Bay Ordinance 97–07 provides for the operation of the City's Code Enforcement Board and contains the following superpriority provision:

> Liens created pursuant to a Board order and recorded in the public record shall remain liens coequal with the liens of all state[,] county[,] district [,] and municipal taxes, superior in dignity to all other liens[,] titles [,] and claims until paid, and shall bear interest annually at a rate not to exceed the legal rate allowed for such liens and maybe foreclosed pursuant to the procedures set forth in Florida Statutes, Chapter 173.

City of Palm Bay, Ordinance No. 97–07, § 1 (1997).

***927** Chapter 162, Florida Statutes (2004), contains the

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Local Government Code Enforcement Boards Act. Section 162.03, Florida Statutes (2004), authorizes municipalities to establish by ordinance local code enforcement boards. Section 162.09(3), Florida Statutes (2004), provides that "[a] certified copy of [a code enforcement] order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." The Act contains no provision expressly authorizing municipalities to establish superpriority for such liens.

Article VIII, section 2(b), Florida Constitution, contains a general provision relating to the exercise of municipal powers: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes *except as otherwise provided by law*." (Emphasis added). Section 166.021, Florida Statutes (2004), contains general provisions governing the exercise of municipal powers under the framework established in article VIII, section 2(b). Section 166.021(1) states: "As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law." Section 166.021(3) provides in pertinent part as follows:

> The Legislature recognizes that pursuant to the grant of power set forth in section 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
>
> ....
>
> (c) Any subject expressly preempted to state or county government by the constitution or by general law....

The priority of interests in real estate under Florida law is generally determined by the operation of three statutes. Section 28.222(2), Florida Statutes (2004), requires the clerk of the circuit court to record instruments in the official records and to "keep a register in which he or she shall enter at the time of filing the filing number of each instrument filed for record, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument." Section 695.11, Florida Statutes (2004), provides that "[t]he sequence of [official register numbers required under section 28.222] shall determine the priority of recordation" so that "[a]n instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series." The legal significance of priority of recordation comes into play in the context of the rule established in section 695.01(1), Florida Statutes (2004), which provides as follows: "No conveyance, transfer, or mortgage of real property, or of any interest therein ... shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law."[1]

***928** The Legislature has, however, provided separately for the priority of certain liens over the priority established under chapter 695. For example, section 197.122(1), Florida Statutes (2004), provides that "[a]ll taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens." Similarly, section 170.09, Florida Statutes (2004), provides that special assessment liens are "coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid."

II. ANALYSIS

[1] Based on the provisions of article VIII, section 2(b), Florida Constitution, and the related provisions in section 166.021, we have acknowledged that "[i]n Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers." *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla.2006). We have also stated that—as is recognized in section 166.021—"a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State." *Hollywood*, 934 So.2d at 1243. But we have never interpreted either the constitutional or statutory provisions relating to the legislative preemption of municipal home rule powers to require that the Legislature specifically state that the exercise of municipal power on a particular subject is precluded. Instead, we have held that "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." *Barragan v. City of Miami*, 545 So.2d 252, 254 (Fla.1989). We have also recognized that where concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, "a municipality's concurrent legislation must not conflict with state law." *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993).

[2] The critical phrase of article VIII, section 2(b)—"except

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as otherwise provided by law"—establishes the constitutional superiority of the Legislature's power over municipal power. Accordingly, "[m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Thomas*, 614 So.2d at 470. When a municipal "ordinance flies in the face of state law"—that is, cannot be reconciled with state law—the ordinance "cannot be sustained." *Barragan*, 545 So.2d at 255. Such "conflict preemption" comes into play "where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute." 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012).

Here, it is undisputed that the Palm Bay ordinance provision establishes a priority that is inconsistent with the priority established by the pertinent provisions of chapter 695. In those statutory provisions, the Legislature has created a general scheme for priority of rights with respect to interest in real property. Giving effect to the ordinance superpriority provision would allow a municipality to displace the policy judgment reflected in the Legislature's enactment of the statutory provisions. And it would allow the municipality to destroy ***929** rights that the Legislature established by state law. A more direct conflict with a statute is hard to imagine. Nothing in the constitutional or statutory provisions relating to municipal home rule or in the Local Government Code Enforcement Boards Act provides any basis for such a municipal abrogation of a state statute. The conflict between the Palm Bay ordinance and state law is a sufficient ground for concluding that the ordinance superpriority provision is invalid.

[3] We categorically reject the City's argument that the legislative enactment of exceptions to a statutory scheme provides justification for municipalities to enact exceptions to the statutory scheme. No authority supports this argument. The power to create exceptions to a legislative scheme is the power to alter that legislative scheme. "Fundamental to the doctrine of preemption is the understanding that local governments lack the authority to craft their own exceptions to general state laws." 5 McQuillin Mun. Corp. § 15:18 (3d ed. 2012). Although municipalities generally have "the power to enact legislation concerning any subject matter upon which the state Legislature may act," § 166.021(3), Fla. Stat. (2004), in exercising their power within that scope municipalities are precluded from taking any action that conflicts with a state statute. In this context, concurrent power does not mean equal power.

III. CONCLUSION

The Fifth District correctly concluded that the superpriority provision of the Palm Bay ordinance is invalid because it conflicts with state law. We approve that determination and answer the certified question in the negative.

It is so ordered.

POLSTON, C.J., and LEWIS, QUINCE, and LABARGA, JJ., concur.

PERRY, J., dissents with an opinion, in which PARIENTE, J., concurs.

PERRY, J., dissenting.

The majority holds that the City of Palm Bay's home rule authority does not provide it with the authority to enact an ordinance providing code enforcement liens superior priority over prior recorded mortgages. Because I disagree that the ordinance irreconcilably conflicts with the mechanical recording statute provided in section 162.09, Florida Statutes (2004), or that the Florida Legislature has expressed a scheme "so pervasive as to evidence an intent to preempt the particular area,"[2] I would find that the city's ordinance was properly enacted. Accordingly, I dissent.

The majority reasons that section 162.09(3) "contains no provision expressly authorizing municipalities to establish special priority for such liens." Maj. op. at 927. However, this is not the appropriate test to determine whether a municipality has exceeded its powers. The City of Palm Bay does not require the Legislature's express permission to act under its home rule powers. Section 166.021(1) states in relevant part that "municipalities ... may exercise any power for municipal purposes, except when expressly prohibited by law." Further, section 166.021(3)(c) provides that the municipality has the power to enact legislation concerning any subject matter upon which the Legislature may act except "[a]ny subject *expressly* preempted to state or county government by the constitution or by general law...." (Emphasis added). Thus, it is not whether the Legislature has expressly authorized municipal power, but whether such power ***930** has been expressly prohibited. Here, there has been no express preemption that would prohibit the City's action.

Because the language contained in sections 162.09, 695.11, and related provisions does not expressly conflict

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with the ordinance, the City was within its authority to enact the ordinance. The majority avoids this outcome by relying on a single line from this Court's decision in *Barragan v. City of Miami*, 545 So.2d 252, 254 (Fla.1989), stating, "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." Maj. op. at 928. The majority's reliance on *Barragan* here is misguided and misleading.

Barragan concerned an ordinance that permitted the City to deduct workers' compensation benefits from an employee's pension benefits in contradiction to the provisions of section 440.21, Florida Statutes (1987). Because the workers' compensation scheme outlined in chapter 440 explicitly applied to every employer and employee working in the state, the City's ordinance was expressly preempted by the statute. *See Barragan*, 545 So.2d at 254 (citing § 440.03, Fla. Stat. (1987)). In *Barragan*, Chief Justice Ehrlich emphasized that, "The city should not be permitted to do indirectly that which it cannot do directly." *Id.* at 255 (Ehrlich, C.J., concurring in result only). In contrast, here the mechanical recording statute does not provide an all-encompassing lien priority scheme. Clearly there is no express preemption of the subject matter concerning the City's ordinance. Yet, the majority maintains that "the **Palm Bay** ordinance is invalid because it conflicts with state law." Again, the majority applies the improper test.

Express preemption is not the same as implied preemption or conflict—this Court has previously distinguished between these concepts. *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886, 888 (Fla.2010) (defining implied preemption as "when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature" and conflict as "when two legislative enactments cannot coexist"); *see also Phantom of Brevard Inc. v. Brevard Cnty.*, 3 So.3d 309, 314 (Fla.2008); *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243, 1246–47 (Fla.2006) (internal quotations omitted). Here, section 166.021 provides that the City may act except where expressly preempted, not impliedly preempted or in conflict. These are distinct tests that should not be conflated. However, no matter the test applied here, there is no preemption evident in the statutes, neither explicit nor implicit.

While the majority recognizes that municipalities can legislate concurrently with the Legislature, *see* Maj. op. at 928 (citing *City of Hollywood*, 934 So.2d at 1243), the majority nevertheless "categorically reject[s] the City's argument that the legislative enactment of exceptions to a statutory scheme provides justification for municipalities to enact exceptions to the statutory scheme." Maj. op. at 929. To read the statute and ordinance as unable to coexist ignores that the Legislature has not previously regarded the mechanical recording statute as a pervasive scheme without exemptions. *See* § 170.09, Fla. Stat. (2004) (providing lien priority and superiority for non-home rule municipality special assessments); § 197.552, Fla. Stat. (2004) (providing superiority for tax deeds except to municipal liens); § 718.116(5)(a), Fla. Stat. (2004) (providing superior lien priority for condominium assessments); § 713.07(2), Fla. Stat. (2004) (providing lien priority for construction liens). Additionally, lien priority ***931** can be altered by contract. Likewise, courts have recognized liens with superior priority despite their inferior filing dates. In *Gailey v. Robertson*, 98 Fla. 176, 123 So. 692 (Fla.1929), this Court found that a "mortgagee has no greater vested right ... than the fee simple owner and the rights of both must yield alike to the sovereign power when exercised to impose proper and lawful taxes." *Id.* at 179, 123 So. 692. The Court accordingly found that the mortgage held by Gailey was not prior in dignity to the lien claimed by the city of Winter Haven, despite its prior recording date. *Id.* at 177, 123 So. 692. In *First Nationwide Mortg. Corp. v. Brantley*, 851 So.2d 885 (Fla. 4th DCA 2003), the Fourth District found that a city lien was not superior to the mortgage because it "was not the result of municipal services, special assessments or any other type lien covered under section 23–68 of the City's Code of Ordinances." *Id.* at 887.

I would find that the Legislature has therefore not expressed a pervasive scheme—the statutes on the issue are scattered and separately enacted. Because the Legislature has provided several exemptions to the "first in time" rule, the City may likewise legislate such a rule under its home rule authority. *See Wyche v. State*, 619 So.2d 231, 238 (Fla.1993) ("Although municipalities and the legislature may legislate concurrently in areas not expressly preempted to the state, a municipality's concurrent legislation may not conflict with state law.").

I would likewise find that there is nothing in section 695.11 that expressly preempts the City of **Palm Bay's** ordinance. As described in *Argent Mortgage Co. v. Wachovia Bank, N.A.*, 52 So.3d 796, 800 (Fla. 5th DCA 2010), section 695.11 is a "mechanism for determining the time at which an instrument was deemed to be recorded." Because there is no express limitation by section 695.11, The City of **Palm Bay** had authority under section 166.021 to enact the ordinance. Accordingly, I dissent.

PARIENTE, J., concurs.

114 So.3d 924, 38 Fla. L. Weekly S322

All Citations

Footnotes

1 The Fifth District states that section 695.11 "codifies ... the common law rule of first in time, first in right." ***Palm Bay***, 57 So.3d at 227. Although it has no bearing on the preemption question at issue in this case, we note that this characterization of Florida law is misleading. The comment incorrectly leaves section 695.01(1) out of consideration and suggests that priority of recordation necessarily establishes priority of right. A thoughtful discussion of the operation of Florida law in determining priority of interests in real property is contained in *Argent Mortgage Co., LLC v. Wachovia Bank N.A.,* 52 So.3d 796 (Fla. 5th DCA 2010); *see also Van Eepoel Real Estate Co. v. Sarasota Milk Co.,* 100 Fla. 438, 129 So. 892 (1930).

2 *Sarasota Alliance for Fair Elections Inc. v. Browning,* 28 So.3d 880, 886, 888 (Fla.2010).

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INSTRUCTIONS FOR FILING
A CONDOMINIUM / COOPERATIVE COMPLAINT

Submitting your complaint on a “Condominium / Cooperative Complaint” form legibly printed or typed all of the information you supply on the form may expedite the processing of your complaint.

Please attach any copies of documentation you have that may support your complaint.
Such documentation may include: condominium documents, minutes of meetings, budgets, financial reports or statements, canceled checks, and statements from other unit owners corroborating one or more of your allegations. Any documentation you submit with the complaint will become part of the division’s file.

Please make sure you sign the complaint form in the space provided. If you wish, you can attach the signatures of other persons who may wish to join in on your complaint, to assist in expediting the investigation of your complaint.

Please understand that the complaint and any documentation that you attach are a matter of public record. Accordingly, any person may inspect the case file and may obtain copies of any of the materials in the file. The division cannot protect the anonymity of your identity.

The division can investigate only alleged violations of the provisions in Chapter 718, Florida Statutes, and Chapters 61B-15 through 61B-24, Florida Administrative Code, pertaining to condominiums, and Chapter 719, Florida Statutes, along with Chapters 61B-75 through 61B-79, Florida Administrative Code, pertaining to cooperatives.

As a result, the division does NOT generally investigate issues involving:

- Maintenance of the common elements or common areas,
- Alterations or additions to the common elements or common areas,
- Violations of the condominium (or cooperative) documents.

The division does NOT investigate issues involving:

- Contractual disputes;
- Criminal matters;
- Discrimination pertaining to age, race, special needs, et cetera; and Internal disputes
- (for example, most issues involving noise, pets, and parking).

PLEASE COMPLETE THE COMPLAINT FORM AS FOLLOWS:

Enter your name, mailing address, and telephone number(s).

Indicate with a check mark whether your complaint is against the developer of your condominium or cooperative, or against your association. Enter the name of that party, followed by the name of the developer’s principal officer or the association’s president, as applicable, followed by that party’s address and telephone number, if known.

State whether you have notified the party against whom the complaint is filed of the issue(s) involved. If so, state how you provided such notification.

Identify the date that the declaration of condominium was recorded in the public records of the county in which the condominium is located, if known. In the case of a cooperative, identify the date the association was incorporated. Insert “unknown” if you do not know this date.

Check in the appropriate space to indicate whether the purchaser unit owners have elected at least a majority of the members of the board of administration (i.e., whether the developer has turned over control of the association).

If you have retained an attorney regarding this complaint, please indicate whether it is permissible for the division to contact your attorney. If so, please provide the attorney’s name, address, and telephone number.

If you and/or your attorney have filed a lawsuit pertaining to the issue(s) in this complaint, please so indicate and attach copies of the complaint to the court and any other pertinent documents (e.g., pleadings, orders, et cetera). Additionally, please indicate whether a petition for a Declaratory Statement and/or Mandatory Non-binding Arbitration has been filed with the division regarding your allegations. Your response will assist the division in resolving your complaint.

Please include a short and plain statement of each issue you wish the division to review.

EXAMPLE: “The association has refused to allow me to inspect the minutes of the board meeting held on October 26, 1999.”

Upon submission, this form and all information contained herein, fall within the provisions of Chapter 119, Florida Statutes, Florida's Public Record Law. Accordingly, any person may inspect the case file and may obtain copies of any of the materials in the file.

This form should be signed and submitted to:

Division of Florida Condominiums, Timeshares and Mobile Homes
1940 North Monroe Street
Tallahassee, Florida 32399-1031.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES

CONDOMINIUM / COOPERATIVE COMPLAINT

INSTRUCTIONS: To expedite your complaint it is helpful if this form is typewritten or legibly printed and each question answered fully. If available, attach supporting or clarifying documents and items pertaining to the issues listed in this complaint.

Name_____

Mailing Address_____

Unit No._____

City_____County_____State_____Zip_____

Home telephone number (____)_____

Business telephone number (____)_____

E-mail address _____

Complaint filed against: ___ DEVELOPER ___ ASSOCIATION

Name_____

If Developer list principal officer _____

If Association list President _____

Mailing address _____

City_____County_____State_____Zip_____

Business telephone number (____)_____

Has the above been notified of the issues in this complaint? ___YES ___ NO

If yes, what was the method of notification?_____

Date declaration of condominium was recorded in public records:

____/____/____County_____

If a cooperative, date articles of incorporation were filed with the Secretary of State:

____/____/____

Have purchaser unit owners elected a majority of the members to the Board of Administration? ___ YES ___ NO

If you have retained legal counsel regarding the issues listed in this complaint, do you want the division to contact your attorney? ___ YES___ NO

If yes, please provide the following information:

Name of Counsel_____

Mailing Address_____

City_____County_____State_____Zip_____

Business Telephone Number (____)_____

a) Has court action been filed regarding any of the allegations in this complaint? ___ YES ___ NO If yes, attach a copy of each complaint filed in court and any subsequent court pleadings.

b) Has a petition for a Declaratory Statement been filed with the division regarding any of the allegations in this complaint? ___ YES ___ NO

c) Has a petition for Mandatory Nonbinding Arbitration been filed with the division regarding and of the allegations in this complaint? ___ YES ___ NO

List each issue. If possible, specify the provisions in the condominium act, or the cooperative act if applicable, which you allege have been violated. Attach additional pages, as needed.

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I hereby request the Division of Florida Condominiums, Timeshares and Mobile Homes to review the violation(s) herein alleged. I understand that the division may take action on this complaint pursuant to the provisions of Section 718.501, or as applicable Section 719.501, Florida Statutes. I further understand that the division does not represent me or my private interests, and that any action taken by the division will be on behalf of the State of Florida. My signature below certifies the authenticity of this complaint.

Signature of Complainant	Name of Condominium / Cooperative
Date	Name of Association

169 So.3d 145
District Court of Appeal of Florida,
Fourth District.

PUDLIT 2 JOINT VENTURE, LLP, a Florida limited liability partnership, Appellant,
v.
WESTWOOD GARDENS HOMEOWNERS ASSOCIATION, INC., a Florida corporation not-for-profit, Appellee.

No. 4D14–1385.
|
May 27, 2015.
|
Rehearing Denied July 31, 2015.

Synopsis

Background: Parcel owner brought action against homeowners' association for breach of contract and declaratory relief, after parcel owner paid to association an amount for delinquent assessments unpaid by the prior owner. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Janis Brustares Keyser, J., granted summary judgment for association. Parcel owner appealed.

Holdings: The District Court of Appeal, Levine, J., held that:

[1] statute making parcel owner jointly and severally liable did not amend association's declaration,

[2] and application of the statute unconstitutionally impaired parcel owner's contractual rights.

Reversed and remanded with directions.

West Headnotes (8)

[1] **Common Interest Communities**
Construction, operation and effect; enforcement of covenants in general

The declaration of condominium, which is the condominium's constitution, creates the condominium and strictly governs the relationships among the condominium unit owners and the condominium association.

Cases that cite this headnote

[2] **Common Interest Communities**
Construction, operation and effect; enforcement of covenants in general

A declaration of condominium must be strictly construed.

Cases that cite this headnote

[3] **Common Interest Communities**
Construction, operation and effect; enforcement of covenants in general

Restrictions found within a declaration of condominium are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms.

Cases that cite this headnote

[4] **Contracts**
Rewriting, remaking, or revising contract

Courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship or improvident bargain.

Cases that cite this headnote

[5] **Common Interest Communities**
Construction, operation and effect; enforcement of covenants in general

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Common Interest Communities
Collection, payment, and abatement

Statute that made a parcel owner within a homeowners' association jointly and severally liable with a previous parcel owner for unpaid assessments did not supersede a provision of homeowners' association's declaration, providing that personal obligations for delinquent assessments would not pass to successors in title unless expressly assumed; declaration provided that automatic amendment of the declaration by legislative action was limited to amendments which were "required" by the plain language of the legislation, but nothing in the statute at issue required adoption of statute, and homeowners' association did not amend its declaration to specifically adopt the statute. West's F.S.A. § 720.3085(2)(b).

Cases that cite this headnote

[6] **Common Interest Communities**
Amendment

A declaration of condominium can be amended according to the procedure outlined within the declaration, or according to statute, by two-thirds' approval of the homeowners.

Cases that cite this headnote

[7] **Common Interest Communities**
Construction, operation and effect; enforcement of covenants in general

Repeal or invalidation by implication of restrictions and provisions in a declaration of condominium is not favored and generally will not be presumed absent a clear legislative intent.

Cases that cite this headnote

[8] **Common Interest Communities**
Construction, operation and effect; enforcement of covenants in general

Common Interest Communities
Collection, payment, and abatement
Constitutional Law
Real property in general

Application of statute that made a parcel owner jointly and severally liable with previous parcel owner for unpaid assessments, in parcel owner's action for breach of contract and declaratory relief, unconstitutionally impaired parcel owner's contractual rights under homeowners' association's declaration, where declaration provided that delinquent assessments would not pass to successors in title, and parcel owner was a third-party beneficiary of the declaration. U.S.C.A. Const. Art. 1, § 10, cl. 1;West's F.S.A. Const.Art. 1, § 10; West's F.S.A. § 720.3085(2)(b).

Cases that cite this headnote

Attorneys and Law Firms

***146** Robin I. Frank of Shapiro Blasi Wasserman & Gora, P.A., Boca Raton, for appellant.

W. Todd Boyd and Yvette R. Lavelle of Boyd Richards Parker & Colonnelli, P.L., Miami, for appellee.

Opinion

LEVINE, J.

The issue presented is whether the trial court's reliance on a Florida statute rather than the provisions of the homeowners' association declaration governing the parties in this case unconstitutionally impairs appellant's right to contract. Because the trial court's application of the statute impairs appellant's freedom of contract, we conclude that the court erred in granting summary judgment in favor of appellee ***147** and reverse and remand for entry of summary judgment in favor of appellant.

Pudlit 2 Joint Venture, LLP, plaintiff/appellant, appeals the entry of summary judgment and order of final dismissal in its breach of contract and declaratory relief action against Westwood Gardens Homeowners Association, Inc., defendant/appellee. Appellant purchased two properties at foreclosure sales that were located within communities maintained by the association. Subsequent to appellant's purchases of the properties, the association demanded

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payment for any and all unpaid association assessments, including those that came due prior to appellant's ownership, under threat of a claims lien foreclosure. Appellant paid the past-due assessments for both properties via check remitting that it "paid under protest and with full reservation of all rights and remedies."

Appellant filed suit against the association seeking damages for breach of declaration (count I) and declaratory relief (count II), alleging that any liens for past due assessments were extinguished by the foreclosure judgments pursuant to the terms of the association's Declaration of Covenants, Conditions, and Restrictions. The association cross-moved for summary judgment, arguing that section 720.3085, Florida Statutes (2013), clearly mandates that appellant is jointly and severally liable with the prior owners for all unpaid assessments on the subject properties, thus amending the declaration. Appellant argued that section 720.3085 did not impose liability upon appellant, because the declaration's express terms were not invalidated by the statute or waived by appellant, and imposition of the statute against the declaration's express terms would unconstitutionally impair its contractual rights.

After a hearing, the trial court entered an order denying appellant's summary judgment motion and an order granting the association's cross-motion. After denying appellant's motion for reconsideration, the trial court entered a final order of dismissal of appellant's claims. Appellant timely appealed.

"The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo." *Major League Baseball v. Morsani*, 790 So.2d 1071, 1074 (Fla.2001). Contract construction and statutory interpretation are both questions of law. *See Mena v. J.I.L. Constr. Grp. Corp.*, 79 So.3d 219, 222 (Fla. 4th DCA 2012); *E.A.R. v. State*, 4 So.3d 614, 629 (Fla.2009).

> If the statute is clear and unambiguous, we will not look behind its plain language for legislative intent or resort to rules of statutory construction to ascertain intent. In such an instance, "the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent."

Harvard ex. rel. J.H. v. Vill. of Palm Springs, 98 So.3d 645, 647 (Fla. 4th DCA 2012) (citations omitted). Further, "[e]very statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts." *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n*, 125 So.3d 846, 849 (Fla. 4th DCA 2013) (citation omitted). This principle "applies with equal force in instances where a part of the statute standing alone may appear to be clear and unambiguous." *Id.* at 850.

[1] [2] [3] [4] "The declaration of condominium, which is the condominium's 'constitution,' creates the condominium and 'strictly governs the relationships among the condominium unit owners and the condominium association.' A declaration of condominium must be strictly construed." ***148** *Curci Vill. Condo. Ass'n v. Maria*, 14 So.3d 1175, 1177 (Fla. 4th DCA 2009) (citation omitted). Furthermore, "[r]estrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms...." *Shields v. Andros Isle Prop. Owners Ass'n*, 872 So.2d 1003, 1005–06 (Fla. 4th DCA 2004) (citation omitted). "Under Florida law, which governs this dispute, 'courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship or improvident bargain.' " *United States v. Bridgewater Cmty. Ass'n*, 2013 WL 3285399, at *9 (M.D.Fla. June 27, 2013) (citation omitted).

The statute at issue in this case, section 720.3085, provides:

> *A parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title.* This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner.

§ 720.3085(2)(b), Fla. Stat. (2013) (emphasis added). Further, under Chapter 720, "the Legislature recognizes that certain contract rights have been created for the benefit of homeowners' associations and members thereof before the effective date of this act and that *ss. 720.301–720.407 are not intended to impair such contract rights.*" § 720.302(2), Fla. Stat. (2013) (emphasis added).

Significantly, the homeowners' declaration in the present case provides that a subsequent owner of a property within the association will not be liable for payment of any assessments owed by the prior owner. Thus, section 720.3085(2)(b) conflicts with the declaration of the association in the case at bar, which provides:

> The annual and special assessments, together with such late charges, interest thereon and costs of collection thereof, as hereinafter provided shall be a charge on the

> land and shall be a continuing lien upon the property upon which each such assessment is made, and said lien may be enforced in the same manner in which mortgages are enforced. Each such assessment, together with such late charges, interest, costs, and reasonable attorney's fees, shall also be the personal obligation of the person who was the Owner of such property at the time when the assessments fell due. *The personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them.*
>
> ....
>
> The lien of the assessments provided for herein shall be superior to all other liens save and except tax liens and mortgage liens, provided said mortgage liens are first liens against the property encumbered thereby (subject only to tax liens). *Sale or transfer of any Lot which is subject to a mortgage as herein described, pursuant to a decree of foreclosure thereof, shall extinguish the lien of such assessments as to payments thereof which become due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof.*

(emphasis added).

[5] [6] [7] The association's argument that the legislature's enactment of section 720.3085 amended the declaration is without merit. A declaration can be amended according to the procedure outlined within ***149** the declaration, or according to statute, by two-thirds' approval of the homeowners. *See Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So.3d 1081, 1090 (Fla. 3d DCA 2014). Generally, "repeal or invalidation by implication [of restrictions and provisions in a declaration] is not favored and generally will not be presumed absent a clear legislative intent." *United States v. Forest Hill Gardens E. Condo. Ass'n,* 990 F.Supp.2d 1344, 1349 (S.D.Fla.2014). The declaration here provides the following amendment procedures:

> [A]s long as Declarant controls the Association, the Declarant may make and file any amendment hereto required by the Declarant or by the Federal National Mortgage Association or Veteran's Administration or Federal Housing Administration or Federal Home Loan Mortgage Corporation or any governmental body with jurisdiction over the Property, provided said amendment does not materially, adversely affect the rights of a Lot Owner, as determined solely by the Declarant, by an instrument executed only be the Developer. Such amendment need not be signed or executed in the manner otherwise provided for herein.

The only provisions in the declaration providing for automatic amendment based on legislative action are limited to amendments which are "required" by the plain language of the legislation. Nothing in the language of section 720.3085(2)(b) demonstrates that it is "required" to be adopted by Florida homeowners' associations. Thus, the association cannot argue that section 720.3085, as enacted by the Florida legislature, automatically amended the association's declaration.[1] *Compare Kaufman v. Shere*, 347 So.2d 627, 627–28 (Fla. 3d DCA 1977) (holding that a specific statutory provision "was incorporated into" the declaration "by virtue of the express wording of the Declaration itself" which "unequivocally states that provisions of the Condominium Act are adopted *'as it may be amended from time to time'* "), *with Palm–Aire Country Club Condo. Ass'n No. 2, Inc. v. F.P.A. Corp.,* 357 So.2d 249, 251–52 (Fla. 4th DCA 1978) (rejecting the lessees' position that "the condominium documents were automatically amended when the Condominium Act was amended," "because, unlike *Kaufman*, the condominium documents in this case do not expressly adopt the provisions of the Condominium Act," and rather outline "an exclusive method of amendment which does not include an automatic amendment whenever there is a change in the Condominium Act"). Because the association did not amend its declaration to specifically adopt section 720.3085, the section should not be applied to supersede the express terms of the declaration.

[8] Thus, the question in this case becomes whether application of section 720.3085(2)(b) unconstitutionally impairs appellant's contractual rights under the association's declaration which absolves appellant of such liability. As previously stated, section 720.3085(2)(b) was "not intended to impair [ ] contract rights" which were "created for the benefit of homeowners' associations and members thereof before the effective date" of the statute. *See* § 720.302(2), Fla. Stat. (2013).

Similar to the federal constitutional contract clause, the Florida Constitution prohibits ***150** the impairment of contracts. *Compare* U.S. Const. art. I, § 10, cl. 1 ("No State shall ... pass any ... Law impairing the Obligation of Contracts...."), *with* Fla. Const. art. I, § 10 ("No ... law impairing the obligation of contracts shall be passed."). Thus, a basic tenet of our constitution, both state and

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federal, is the prohibition on impairment of contracts. Justice Joseph Story, in considering the impairment of contracts by the states, stated that

> [a]ny deviation from its terms, by postponing, or acceleration the period of performance of which it prescribes, or by imposing conditions not expressed in the contract, or by dispensing with the performance of those, which are a part of the contract, however minute, or apparently immaterial in their effects upon it, impairs an obligation. *A fortiori,* a law, which makes the contract wholly invalid, or extinguishes, or releases it, is a law impairing it.

Joseph Story, A Familiar Exposition of the Constitution of the United States § 244, at 197 (Regnery Gateway, Inc. 1986) (1859).

"An impairment occurs, ... when a contract is made worse or is diminished in quantity, value, excellence or strength." *Lawnwood Med. Ctr., Inc. v. Seeger,* 959 So.2d 1222, 1224 (Fla. 1st DCA 2007). "In this state, it is a 'well-accepted principle that virtually no degree of contract impairment is tolerable.' " *Coral Lakes Cmty. Ass'n v. Busey Bank, N.A.,* 30 So.3d 579, 584 (Fla. 2d DCA 2010) (quoting *Pomponio v. Claridge of Pompano Condo., Inc.,* 378 So.2d 774, 780 (Fla.1979)). A third-party beneficiary to a contract possesses the same constitutional right against the impairment of that contract as the parties to the contract. *See id.* (citing *Greenacre Props., Inc. v. Rao,* 933 So.2d 19, 23 (Fla. 2d DCA 2006) (explaining that to enforce rights under a declaration, "[a] third party must establish that the contract either expressly creates rights for them as a third party or that the provisions of the contract primarily and directly benefit the third party or a class of persons of which the third party is a member")).

In *Coral Lakes,* the bank instituted a foreclosure action against the homeowners, adding the HOA as a defendant because of a lien for accrued unpaid assessments. The HOA, relying upon section 720.3085, claimed that if the bank purchased the mortgaged premises at a foreclosure sale, then it would be jointly and severally liable with the previous owner to pay the past due assessments. 30 So.3d at 582. The bank argued that it was an intended third-party beneficiary of the HOA's declaration which provided that neither it nor a third-party purchaser at a foreclosure sale would be liable for past due assessments.[2] The trial court agreed with the bank and entered a final judgment in foreclosure, ruling that the bank would not be liable for unpaid assessments due to the HOA upon purchasing the property. *Id.* at 583.

On appeal, the Second District agreed with the trial court's analysis, finding that first mortgagees, like the bank, "although not parties to the Declaration that is the contract between the HOA and its members, ***151** are clearly third-party beneficiaries of this contract." *Id.* at 584. The court concluded that "the Declaration's plain and unambiguous language ... controls and absolves the Bank, as first mortgagee, from liability for any assessments accruing before it acquires the parcel." *Id.* at 583–84. Thus, the appellate court affirmed, stating that "[t]o hold otherwise would implicate constitutional concerns about impairment of vested contractual rights." *Id.* at 584. *See also Ecoventure WGV, Ltd. v. Saint Johns Nw. Residential Ass'n,* 56 So.3d 126, 127–28 (Fla. 5th DCA 2011) (holding that section 720.3085 cannot "be applied to impose joint and several liability on [appellant] for the unpaid homeowner's association assessments incurred by its mortgagor," because imposing the statute on appellant " 'would operate to severely, permanently, and immediately change the parties' economic relationship ... a circumstance not supportable under the law' ") (quoting *Coral Lakes,* 30 So.3d at 584).

Here, the declaration provides that "[t]he personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them" and "[s]ale or transfer of any Lot ... pursuant to ... foreclosure ... shall extinguish the lien of such assessments as to payments thereof which become due prior to such sale or transfer." Thus, the declaration "expressly creates rights" for successors in title to properties within the association, like appellant, and the declaration provisions "primarily and directly benefit" successors in title. *Rao,* 933 So.2d at 23. Accordingly, appellant, a successor in title, is clearly an intended third party beneficiary and holder of vested rights in the declaration. *See id.*; *Coral Lakes,* 30 So.3d at 584. Further, "the Declaration's plain and unambiguous language ... absolves [appellant], as [successor through a foreclosure sale], from liability for any assessments accruing before it acquires the parcel." *Coral Lakes,* 30 So.3d at 583–84. Such "a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms." *Shields,* 872 So.2d at 1005–06 (citation omitted).

In summary, the trial court's reliance on section 720.3085(2)(b) rather than the provisions of the declaration violated appellant's right against the impairment of contract, where appellant was a third-party beneficiary of the declaration. Based on the plain,

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unambiguous language of the declaration, absolving a successor in title from any liability for assessments that accrued prior to the successor's acquisition of title, appellant was not liable for the unpaid assessments demanded by the association. For these reasons, we reverse the summary judgment entered in favor of the association and remand for entry of summary judgment in favor of appellant.

Reversed and remanded with directions.

MAY and CIKLIN, JJ., concur.

All Citations

169 So.3d 145, 40 Fla. L. Weekly D1248

Footnotes

1 Likewise, section 720.3085 does not declare association declaration provisions which waive a third party purchaser's liability for unpaid assessments on foreclosed properties to be "null and void as against public policy." *Cf.* § 720.3075(1), Fla. Stat. (2013) (specifying certain HOA declaration provisions that are "declared null and void as against the public policy of this state").

2 The provision the bank relied upon states:

> Where any person obtains title to a LOT pursuant to the foreclosure of a first mortgage of record, or where the holder of a first mortgage accepts a deed to a LOT in lieu of foreclosure of the first mortgage of record of such lender, such acquirer of title, its successors and assigns, shall not be liable for any ASSESSMENTS or for other moneys owed to Coral Lakes which are chargeable to the former OWNER of the LOT and which became due prior to acquisition of title as a result of the foreclosure or deed in lieu thereof, unless the payment of such funds is secured by a claim of lien recorded prior to the recording of the foreclosed or underlying mortgage.

Coral Lakes, 30 So.3d at 581.

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155 So.3d 373
District Court of Appeal of Florida,
Third District.

CENTRAL MORTGAGE COMPANY, Appellant,
v.
Linda M. CALLAHAN, et al., Appellees.

No. 3D13–1672.
|
July 16, 2014.

Synopsis
Background: Mortgagee brought foreclosure action against mortgagors and various property owners associations. After entry of foreclosure judgment, mortgagee filed motion to determine the amount of assessments owed to the associations. The Circuit Court, Miami–Dade County, Spencer Eig, J., denied the motion. Mortgagee appealed.

[Holding:] The District Court of Appeal, Lagoa, J., held that as matter of first impression, trial court lacked jurisdiction to determine the amount of assessments owed by mortgagee to the associations.

Affirmed.

West Headnotes (6)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Whether a court has subject matter jurisdiction involves a question of law that is reviewed de novo.

Cases that cite this headnote

[2] **Mortgages**
Conclusiveness, Operation, and Effect of Judgment or Decree

In a foreclosure case, after entry of a final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case unless jurisdiction was reserved to address that matter or the issue is allowed to be considered post-judgment by statute or under a provision of the rules of civil procedure.

2 Cases that cite this headnote

[3] **Common Interest Communities**
Collection, payment, and abatement
Mortgages
Conclusiveness, Operation, and Effect of Judgment or Decree
Mortgages
Execution and Enforcement of Judgment or Decree

Trial court lacked jurisdiction, after expiration of the ten-day time period for filing a motion to alter or amend mortgage foreclosure judgment, to determine the amount of assessments owed by mortgagee to various property owners associations, despite contention that trial court had jurisdiction to enforce the judgment; entitlement to assessments was neither litigated nor adjudicated in the foreclosure action, and foreclosure judgment did not state the amount, if any, that was due to the associations, such that there was nothing for trial court to enforce. West's F.S.A. §§ 718.116, 720.3085; West's F.S.A. RCP Rule 1.530(g).

4 Cases that cite this headnote

[4] **Divorce**
Authority and discretion of court

Courts retain jurisdiction to enforce dissolution of marriage judgments with or without a specific reservation of such power.

Cases that cite this headnote

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[5] **Judgment**
Proceedings to Enforce Judgment

A court does not have the power, in enforcing a judgment, to impose upon a party a new duty not previously adjudicated.

Cases that cite this headnote

[6] **Common Interest Communities**
Collection, payment, and abatement
Mortgages
Conclusiveness, Operation, and Effect of Judgment or Decree

Provision of mortgage foreclosure judgment reserving jurisdiction "to enter further orders that are proper, including, without limitation, writs of possession and deficiency judgments" did not allow trial court to determine, after expiration of the ten-day time period for filing a motion to alter or amend the judgment, the amount of assessments owed by mortgagee to various property owners associations; provision was a general reservation of jurisdiction that did not specifically reserve jurisdiction to determine the amount of assessments due. West's F.S.A. §§ 718.116, 720.3085; West's F.S.A. RCP Rule 1.530(g).

3 Cases that cite this headnote

Attorneys and Law Firms

***374** Brock and Scott, PLLC, and Shaib Rios, Fort Lauderdale, for appellant.

Paige Law Group, P.A., and Robert E. Paige, for appellees Old Cutler Lakes by the Bay Community Association, Inc., Windy Pointe Homeowners Association, Inc., and Windy Pointe Condominium Association, Inc.

Before SUAREZ, LAGOA, and LOGUE, JJ.

Opinion

LAGOA, J.

Central Mortgage Company ("Central") appeals from a final order denying its post-judgment motion for a determination of assessments due to Old Cutler Lakes by the Bay Community Association, Inc., ("Old Cutler"), Windy Pointe Homeowners Association, Inc., ("Windy Point H.O.A."), and Windy Point Condominium Association Inc., ("Windy Point Condo") (collectively, the "Associations"). Because the trial court lacked jurisdiction to entertain the motion, we affirm.

I. *FACTUAL AND PROCEDURAL HISTORY*

In 2009, Central filed an action to foreclose a mortgage after the borrowers defaulted on the underlying loan. Central named the borrowers and the Associations as defendants. In its Answer, the Associations asserted entitlement to assessments pursuant to sections 718.116 and 720.3085, Florida Statutes (2013).

On October 4, 2011, the trial court entered final judgment of foreclosure in favor of Central. Paragraph 4 of the final judgment states that Central's lien is "superior in dignity to any right, title, interest or claim of the defendants" with the exception of any assessments that are superior pursuant to section 718.116. The trial court reserved jurisdiction "to enter further orders that are proper, including, without limitation, writs of possession and deficiency judgments."

Central was the successful bidder for the property at auction and was issued a certificate of title. Upon receiving title, Central requested estoppel letters from the Associations to determine past due assessments, late charges, costs and attorney's fees. Old Cutler claimed $6,186.40, with assessments dating back to July 2008; Windy Pointe H.O.A. claimed $9,072.40, with assessments dating back to January 2010; and Windy Point Condo claimed $11,975.36, with assessments dating back to September 2008.

On March 13, 2013, Central filed a post-judgment motion seeking a determination of the amount due to the Associations. ***375** The motion was filed outside the ten-day period provided by Florida Rule of Civil Procedure 1.530(g).[1] The trial court denied the motion, and this appeal ensued.

II. *ANALYSIS*

[1] The issue before us is one of first impression. Specifically, whether a trial court's inherent jurisdiction to enforce its judgment includes the authority to determine statutory assessments where the time to alter, modify, or

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vacate the judgment has elapsed and the judgment provides for only a general reservation of jurisdiction.[2]

[2] "In a foreclosure case, after entry of a final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case ... unless jurisdiction was reserved to address that matter or the issue is allowed to be considered post-judgment by statute or under a provision of the Florida Rules of Civil Procedure." *Ross v. Damas*, 31 So.3d 201, 203 (Fla. 3d DCA 2010) (citation omitted). It is undisputed that there is no specific reservation to determine the amount of any assessments owed to the Associations.

[3] [4] Central argues that notwithstanding *Damas*, the trial court had inherent jurisdiction to adjudicate its post-judgment motion for assessments. In support of its argument, Central cites *Huml v. Collins*, 739 So.2d 633, 634 (Fla. 3d DCA 1999), where this Court held "a trial court always has the inherent jurisdiction to enforce its previously entered orders." Central's reliance on *Huml* is misplaced; *Huml* is a dissolution of marriage case, and "[c]ourts retain jurisdiction to enforce dissolution judgments with or without a specific reservation of such power." *Kennedy v. Kennedy*, 638 So.2d 577, 577 (Fla. 3d DCA 1994); *see also Work v. Provine*, 632 So.2d 1119, 1121 (Fla. 1st DCA 1994); *Seng v. Seng*, 590 So.2d 1120, 1121 (Fla. 5th DCA 1991).

Moreover, the post-judgment motion at issue in *Huml* pertained to post-judgment enforcement of the property rights that had been specifically adjudicated and set forth in the final judgment. *Huml*, 739 So.2d at 634; *see also Kennedy*, 638 So.2d at 577 (affirming an enforcement order and holding that the trial court had jurisdiction, "[b]ecause the appealed order pertains to property distributed by the dissolution judgment"); *Gutjahr v. Gutjahr*, 368 So.2d 93, 94 (Fla. 3d DCA 1979) (affirming a trial court's post-judgment order which "related to securities which the judgment had dealt with as being the wife's property").

[5] In the instant case, entitlement to assessments was neither litigated nor adjudicated. The final judgment of foreclosure does not state what amount, if any, was due to the Associations. Rather, paragraph 4 of the final judgment solely establishes the priority of liens and provides that Central's lien is superior to the Associations' liens, except with respect to assessments under section 718.116. Simply put, when Central filed its post-judgment motion, there was nothing for the trial court to enforce. Moreover, a court "does not have the power to impose upon a ***376** party a new duty not previously adjudicated." *Superior Uniforms, Inc. v. Brown*, 221 So.2d 214, 215 (Fla. 3d DCA 1969).

[6] Central also argues that based on paragraph 12 of the final judgment, the trial court retained jurisdiction to determine the amount of assessments due. Central claims paragraph 12's language is sufficiently broad to permit the trial court to adjudicate assessments, and that adjudicating assessments is analogous to adjudicating "collateral and independent" claims, e.g., prevailing-party attorney's fees, which may be adjudicated post final judgment. We find both of Central's arguments without merit.

This Court has held that a reservation of jurisdiction must be specific. *See Harrell v. Harrell*, 515 So.2d 1302, 1304 (Fla. 3d DCA 1987) (stating that once a trial court enters a final judgment and the time for filing post-trial motions has expired, a trial court may not entertain post-judgment motions absent a rule to the contrary, "unless it specifically retained jurisdiction to do so in its final judgment").

In *Ross v. Wells Fargo Bank*, 114 So.3d 256, 257 (Fla. 3d DCA 2013), the trial court reserved jurisdiction in a clause identical to paragraph 12 of the final judgment in the instant case.[3] Subsequent to final judgment, Wells Fargo filed a motion for leave to file a supplemental complaint to re-foreclosure and add Ross as a defendant. The trial court granted Wells Fargo's motion, then entered and subsequently vacated an order dismissing the re-foreclosure for lack of prosecution. Ross appealed, arguing the trial court lacked "subject-matter jurisdiction to permit the post-judgment re-foreclosure action to proceed." *Id.* This Court agreed that the trial court lacked jurisdiction, stating "[t]he final judgment did not retain jurisdiction to allow for a supplemental complaint to add an omitted party post-judgment," *id.*, and reversed the trial court's order.

As in *Wells Fargo Bank*, paragraph 12 of the final judgment in the instant case contained a general reservation of jurisdiction, and did not specifically reserve jurisdiction to determine the amount of assessments due pursuant to sections 718.116 or 720.3085. It merely retained jurisdiction to enforce—via writs of possession and deficiency judgments—the final judgment entered in the matter. As such, we find that the trial court properly concluded that it lacked subject-matter jurisdiction to determine assessments, and did not err in denying the motion.

For the reasons discussed, we affirm the trial court's order denying Central's post-judgment motion for a determination of assessments due to the Associations, as the trial court properly concluded it lacked jurisdiction to entertain the motion.

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AFFIRMED. 155 So.3d 373, 39 Fla. L. Weekly D1478

All Citations

Footnotes

1 The Supreme Court of Florida subsequently amended Rule 1.530(g) to provide that the motion must be served no later than fifteen days after entry of the judgment. *In re Amendments to Fla. Rules of Civil Procedure,* 131 So.3d 643, 651 (Fla.2013) (amended rule effective January 1, 2014).

2 "[W]hether a court has subject matter jurisdiction involves a question of law that is reviewed de novo." *Nissen v. Cortez Moreno,* 10 So.3d 1110, 1111 (Fla. 3d DCA 2009).

3 Specifically, the trial court's general reservation clause in *Wells Fargo Bank* stated as follows: "The Court retains jurisdiction of this action to enter further Orders that are proper including, without limitation, writs of possession and deficiency judgments."

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Tampa Bay Times
WINNER OF 10 PULITZER PRIZES

Lawsuits attack business model of Tampa's LM Funding

Susan Taylor Martin, Times Senior Correspondent

Monday, January 4, 2016 11:57am

Tampa-based LM Funding America is off to a rocky start as a publicly traded company.

The firm — which buys the rights to collect delinquent homeowners association dues — is under attack in two lawsuits accusing it of illegal practices.

One suit, filed by a Miami condo association, alleges that LM Funding concocted a "criminally usurious lending scheme" that targeted struggling community associations.

The other suit, by a company that buys distressed assets, accuses LM Funding and its CEO, Tampa attorney Bruce Rodgers, of demanding payment of fees to which they are not entitled.

Both lawsuits seek status as class actions, a move that could vastly expand the number of plaintiffs trying to collect from LM Funding.

Rodgers on Friday called the claims "baseless and without merit."

"All of the things they are alleging we do are on behalf of community associations comprised of ordinary citizens that have to pay more if these lawsuits succeed," he said. "We really are defending the little people here."

Founded in 2008, LM Funding says it helps struggling associations by paying them upfront money for maintenance and repairs in exchange for the right to collect delinquent fees from unit owners. The amount LM Funding pays is equal to what the association would receive by law if the lender foreclosed — 12 months of delinquent assessments or 1 percent of the mortgage value, whichever is less.

LM Funding then hires Business Law Group — a Tampa law firm founded by Rodgers — to bill the owners. After collecting the debt, the law firm keeps enough to cover attorney fees and costs and gives LM Funding the interest, late fees and an amount equal to what it paid the association.

Whatever is left goes to the association.

Since its founding, LM Funding has bought the collection rights on 11,000 condos in nearly 500 associations. Among them are numerous condos that Primestar-H Fund 1 Trust acquired after the owners defaulted on their mortgages.

In a suit in federal court in Tampa, Primestar acknowledges it is liable for a certain amount of past-due association fees. But Primestar says Rodgers, LM Funding and Business Law Group also demanded attorney costs, late fees and other charges not allowed under Florida law.

In one case, that of an Orlando condo, Primestar says its maximum liability on the $226,5000 mortgage balance was 1 percent, or $2,265. But Business Law Group demanded it pay $36,623.

"Defendants' practice essentially holds first mortgagees ... hostage because they cannot obtain clear title and dispose of a property until they satisfy the association's lien," the suit says.

Aaron Gordon, LM Funding's general counsel, said the so-called "safe harbor" cap that limits liability for delinquent fees does not apply in all cases. He also questioned Primestar's decision to file suit after LM Funding had raised almost $10 million by going public in October.

"You can surmise the motivation," he said.

In a suit filed in Miami-Dade County, the Solaris at Brickell Bay Condominium Association says that while LM Funding purports to "buy" the rights to delinquent accounts, it actually operates as a lender charging illegally high interest.

In 2011, LM Funding paid Solaris $140,458 but later collected $198,410 on the accounts. When Solaris terminated the contract, LM Funding demanded an additional $395,605 for what it said was the value of uncollected accounts and the interest that had accrued on them.

"Thus a debt of less than $150,000 became a debt of nearly $600,000 in less than three years," the suit says.

Alleging that LM Funding violated Florida's usury laws, Solaris wants the company to pay it and other condo associations double the amount of interest it has collected — potentially hundreds of thousands of dollars or more.

Gordon, LM Funding's counsel, said the suit is meritless.

"They are on their third amended complaint," he said. "It keeps getting dismissed because they have trouble stating a complaint."

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Lawsuits attack business model of Tampa's LM Funding 01/04/16
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CREATIVE SOLUTIONS TO FREQUENTLY-ENCOUNTERED TITLE ISSUES

Clifford Rainey
Fund Sr. Underwriting Counsel

Clifford W. Rainey is a Senior Underwriting Counsel with Attorneys' Title Fund Services, LLC. Previously, Cliff was a Senior Underwriting Counsel with Attorney's Title Insurance Fund, Inc. Headquarters for several years. Cliff has also been Georgia State Counsel for Attorney's Title Insurance Fund, Inc. and Attorneys' Title Fund Services, Inc. and has been an Assistant Vice President and Regional Counsel for another attorney related Title Insurer.

Prior to becoming a Title Insurance Underwriter, Cliff was associated with two law firms in Tallahassee and his practice included a wide array of matters relating to the representation of banks. Cliff also has experience in litigation, most recently as a Title Litigation Attorney with two large firms whose practice largely relates to foreclosures and the representation of lenders.

Cliff has a B.S. in Finance and J.D. from Florida State University. Cliff is admitted to the Florida Bar and the Georgia Bar. Cliff has made a number of presentations on a number of title related topics, including the topics of Homestead and the Marketable Record Title Act for Board Certification review courses and has made several Legislative Update presentations at The Fund Assembly.

Cliff's title experience includes underwriting and claims in several states including, Florida, and he has been a Commercial Underwriting Attorney and has supervised the Reinsurance function at Attorney's Title Insurance Fund, Inc.

Fund Assembly 2016

Creative Solutions to Frequently-encountered Title Issues

"Cures for the Common Conundrum"

By: Clifford W. Rainey, Fund Senior Underwriting Counsel
Rebecca L.A. Wood, Fund Underwriting Counsel

Curative Statutes and Other Methods of resolving Common Title Issues

Lack of Acknowledgment – Proof by Subscribing Witness

- Sec. 695.03, F.S.
- TN 1.05.03
- Applied to deeds without a proper acknowledgment
- To entitle a document to be recorded, the document can be proved by a subscribing witness
- The original deed should be recovered and a certificate from the witness proving the execution should be attached and the deed re-recorded

Lack of Witnesses

- Sec. 95.231, F.S.
- Deed of record for more than 5 years
- No showing of fraud, adverse possession or pending litigation
- May be used to cure the lack of witnesses
- Also, may be applicable to a "defect" in an acknowledgment
- May not apply to a lack of acknowledgment TN 1.03.01

Lack of Recorded Evidence of Authority

- Sec. 694.08, F.S.
- Deed of record for more than 7 years
- The deed executed in a representative or official capacity
- Proper evidence not recorded demonstrating the authority of the signer
- At least one interim conveyance
- No showing of fraud, adverse possession or pending litigation
- May be used to resolve a lack of recorded evidence of authority including the lack of recorded Power of Attorney
- Applicable to the lack of deed witnesses

Federal Estate Tax Lien Release – Transaction Specific

- 26 U.S.C. Sec. 6325(c)
- Certificate of Discharge
- Application Form 4422
- Useful where the Estate Tax Return is filed but an Estate Tax Closing Letter and evidence of payment based thereon is not available
- It has been reported that this process takes weeks rather than months

Chapter 7 Bankruptcy, Homestead and Pre-petition Judgment Liens

- TN 5.03.01
- Generally, assets abandoned by a Bankruptcy Trustee go back to the Debtor with all its blemishes, including judgment liens.
- All assets of the Bankruptcy Estate are owned by the Estate until such time as the asset is abandoned by the Trustee or otherwise administered
- Upon abandonment of the asset by the Bankruptcy Trustee, judgment liens must generally be released in order to insure a sale from the Debtor
- Homestead Property may be considered abandoned (owned again by the Debtor)
    - 30 days after the First Creditors' Meeting

  - the asset was scheduled as Exempt
  - no action was taken to challenge the exempt status or, if so, it failed
  - the debtor has been discharged
- In insuring the sale of the Homestead property abandoned back to the Debtor, the Member should still consider the necessary proof to determine that the liens do not attach due to Homestead nature of the property
- For Judgment Liens less than $500,000 record proof of Homestead nature of the property TN 5.03.01 and TN 5.07.01
- Proceedings pursuant to Bankruptcy Code 522(f)
- Judicial Cancellation of Judgment Liens per Sec 55.145, F.S.
- Procedures outlined in TN 16.04.08, including Notice of Homestead procedure per Sec. 222.01, F.S. where applicable.

Indemnification Letters and the Mutual Indemnification Agreement

- The use of an indemnification letter or the MIA can be a useful solution
- This practice does not; however, constitute a cure of the title objection
- Use of the Indemnification or MIA is not “automatic”
- Request from Underwriting authorization to rely on
- Make the exception for the title objection and provide affirmative coverage
- Transaction Specific Indemnifications/Undertaking
  - Evaluate whether, for Client’s purposes, issuance of the new title policy without resolution is acceptable
  - Request Indemnification letter from Existing Title Insurer making objection in the form of an Exception
  - Provide Policy, Indemnification Letter, and commitment to Underwriting

  - Depending on the matter objected to, authorization may be provided or declined, or the Underwriter might approve based upon an Indemnification with an Undertaking to Cure
  - Upon approval, Title Policy should generally be issued with an exception and affirmative coverage added to the exception
  - A copy of the Prior Policy along with the Indemnification Letter should be retained by the Member along with authorization from Underwriting
- Mutual Indemnification Agreement (Treaty)
  - The MIA is an agreement between most of the Title Insurers (but not all)
  - Allows for the issuance of the new Title Policy without getting the Indemnification Letter
  - Applies under limited circumstances for specified common defects.
  - General Limitations
    - Their Insured is selling or mortgaging the property
    - Existing Policy must have an effective date of at least a year prior to the transaction to be insured
    - Can be based upon a Loan policy where the Insured Lender has become the Owner
  - Covers
    - Lack of Spousal Joinder or recitation of Marital Status or Non-Homestead Status
    - Certain Judgment Liens and State Tax Liens (not to exceed the aggregate of $500,000)
    - Unsatisfied Mortgages less than $500,000 (but not LOC's)
    - Due Process Issues in Prior Litigation
    - Lack of Recorded Authority to Sign
    - Lack of proof of Estate Tax Lien release
    - Lack of Deed Witnesses
    - Acknowledgment Defects
    - Lack of Corporate Seal
  - A more complete synopsis of the MIA in Appendix C of the Title Notes

- The MIA eliminates the need to seek a transaction specific letter
- Fund Members may and are encouraged to obtain authorization from Underwriting to rely on the MIA
- Retain a copy of the prior policy in the transaction file along with a notation signifying reliance upon the MIA (and notate same on remittance to The Fund).

Tools of the Trade - Paradigms, Charts and Databases

In contemporary times, there are many tools available to a closing attorney to find information, find people and find off record information that might help eliminate potential title issues. There are instances where closing attorneys have thwarted fraud by gathering vital information found by internet search and making a phone call and acting on this information. There are many resources at your finger-tips via the internet. – A sample of easily accessible data Bases include

- National Information Center - warehouses a large amount of information regarding currently existing lenders and lenders that no longer exist
- MERS - when dealing with a MERS mortgage, the MERS database assists you in confirming who the current “lender” is for the mortgage
- Secretary of State (Florida and other states) – primarily used for business entity information and principals of the entity
- Name searches and review of social media can help identify and locate persons
- LABINS - an official State Source of Original Government Surveys and Aerials – useful in dealing with water rights issues and property that may be owned by the State of Florida because it was once submerged
- TheFund.com
  - Current and Archived Concept Articles with alpha search
  - An Index to Q&As published in the Concept
  - Case Summaries

- Title Notes, Fund Procedures Handbook, Standard Commitment Clause Book and Affidavit Practice Manual
- CFPB and TRID information and FAQ's
- Various Easy to follow Paradigms and Charts containing important Underwriting concepts and resolutions (including Knox's Judgment Lien Paradigm)
- A number of resources created by the Fund Education Department relating to closings, TRID and title related matters

We are undergoing a project where we are developing and adding a number of new paradigms and charts to our website in hopes to allow Members to more easily work through some of the more complicated issues. Some that we have been working on include an updated Knox's Judgment Lien Paradigm, Estate Tax Clearances, Probate, Evaluating a Lis Pendens, a Water Rights Paradigm, a Mortgage Modification Chart and a Statute of Limitations Cheat Sheet included at the end of the materials.

Common Title Premium Rating Issues

Questions relating to methods of coverage, rating, and the effect of the proposed modification as a novation are a very common inquiry to Underwriting. This presentation includes a discussion of many of these concepts because this topic is a common inquiry. For a more detailed discussion of Mortgage Modifications Members will find helpful the Fund Procedures Handbook, Chapter 9 "Rating and Submitting the Forms."

Endorsement to Existing ORNTIC Policy

Mortgage Modification Endorsements (ALTA 11-06)

- Only used where there is no material modification of the mortgage
- No premium Charge
- Does not advance effective date

- A Form E Endorsement can be used instead of the ALTA 11-06
- A Form E may be necessary because of the lender's requirement that the effective date of the policy to be advanced

Form E Endorsement

- A "Blank Endorsement" used to amend a title policy as originally written
- Used only in limited circumstances and rarely in relation to an Owner's Policy
- Most often used to endorse an existing loan policy to extend coverage in relation to a mortgage modification
- If the Lender requires the effective date to change, the Form E is the endorsement to do this.
- Changing the effective date on a loan policy does not trigger premium
- Material Modification of the terms of the Mortgage may trigger premium
- The Form E endorsement is used to:
    - Advance the effective, upon request of the lender,
    - Evidence the insured instrument is as modified, and
    - Add and delete exceptions as necessary based upon a proper title examination.
- Premium – Substitution Loan Rates on the Outstanding Principal Balance when insuring a mortgage that is being materially modified

New Policy

- A new Loan Policy may be issued to cover a mortgage as modified
- Some Lenders require a new policy to be issued rather than an endorsement
- A New Policy is necessary if the prior policy was not issued on ORNTIC in order for ORNTIC to insure the mortgage as modified
- Substitution Loan Rates charged on the outstanding balance

Mortgage Priority Guarantee (FMG)

- Available where the mortgage to be modified is issued on another Title Insurer
- A stand-alone policy with limited coverage
- Provides Coverage relating to continued priority
- Does not endorse the prior policy or expressly adjust the coverages of the existing policy
- Used only where the modification is not material in nature
- Premium $125.00

Mortgage Modification not Resulting in Premium

- Use an ALTA 11-06
- Use a Form E to advance Effective Date
- FMG available if Mortgage not insured by ORNTIC
- Rule 69O-186.005(13)
    - Extend the time for Repayment
    - Decrease in Interest Rate
    - Increase in Interest with exception for loss of priority
    - Change in Amortization to extend term
    - Release of Collateral
    - Corrections to Perfect Lien or comply with Terms
- Other non-material modifications
- If advance the effective date, boiler plate exceptions are re-imposed

Mortgage Modification Resulting in Substitution Loan Rates

- Includes changes not in list contained in Rule 69O-186.005(13)
- Includes changes that materially modify the existing indebtedness that further burdens the borrower or inferior lien holders
- The lender's requirement for payment of consideration for modification
- Spreader Agreements (except "Classic Creeping Construction" Loans)

- Assumptions
    - Mortgage Fully Assumable
    - Assumption Prohibited
- Future Advances where the Mortgage does not contain an adequate Future Advance Clause
- Priority Issues must be considered
- Subordination Agreements or Releases are required or Exceptions must be made
- Use a Form E to endorse Existing Loan Policy
    - Demonstrate the change insured instrument includes the modification
    - Advance the Effective Date if required by Insured Lender
    - Add appropriate exceptions including boiler plate exceptions
- Substitution Loan Rates charged on the Existing Outstanding Principal Balance
- New Policy can be issued at Substitution Loan Rates where mortgage was previously insured
- FMG is not available

Mortgage Modification with Future Advance

- Analyze whether Substitution Loan Rates Applies
    - A Material Modification done in conjunction with the Future Advance
    - Inadequate or Non-Existent Future Advance Clause
- If existing adequate Future Advance Clause, the Future Advance does not trigger Substitution Loan Rates
- Future Advance should be rated at Original Rates as to the increased Exposure
- If includes a material modification, then Substitution Loan Rates on the outstanding principal balance should be added to the premium charged for the advance

- Priority Issues must be considered if Future Advance includes Modification – including an inadequate Future Advance Clause
- Use the Form E Endorsement
    - Evidence the increase in coverage due to the Future Advance
    - Demonstrate the change insured instrument includes the modification
    - Advance the Effective Date if required by Insured Lender
    - Add appropriate exceptions including boiler plate exceptions
- FMG is not available
- “Stacked” Policy where existing Mortgage Insured by a different title insurer

Paradigms, Charts and Cheat Sheets

Knox's Basic Judgment Lien Paradigm (updated 2015)

The Basic Judgment Lien Paradigm is an effort to organize the various changes to Florida judgment lien law since 1987. The inspiration was Rohan Kelley's use of a paradigm to organize and simplify Florida homestead law.

Like the homestead paradigm, the sheet is divided into two parts. If the answers to the questions leave you on the left hand side of the page, then the judgment is still a lien. If the answers carry you to the right hand margin at any point, then the judgment is not a lien. However, note **this paradigm does not address title insurance gap issues presented by judgments that are not perfected as liens**, nor any subsequent recordings of judgments that may create a perfected lien which must be run through the paradigm pursuant to the WARNING contained on the right hand side of the paradigm and the WARNING below.

The basic paradigm is based on the following assumptions:
1) It deals only with case law as it exists on January 1, 2008. The user must stay current on statutory and case law changes.
2) It deals solely with Florida judgments. No effort has been made to factor in the various domestication processes for judgments of other jurisdictions.
3) It assumes that the debtor owns non-exempt real property that is subject to levy, i.e. the basic paradigm does not address issues of homestead, entireties, bankruptcy, etc.
4) The word "After" in the paradigm means "on or after". Because the recording of a certified copy is an absolute requirement for a judgment lien, where the words "recorded", "recording", or "re-recorded" are used in connection with a judgment, it means a certified copy.

WARNING: Each recording of a judgment must be reviewed independently to determine if a lien has been created. Just because the initial recording of a judgment contains a defect that prevents it from being a lien does not preclude a later recording that complies with the requirements to create a lien. *Hott Interiors, Inc. v. Fostock,* 721 So. 2d 1236 (Fla 4th DCA 1998) (where a judgment lacks creditor's address, lien is created with recording of a simultaneous address affidavit). In addition, any judgment that has been re-recorded after the initial 7 or 10 year expiration but prior to the expiration of 20 years from the initial recording, should be treated as a new judgment that must be run through the paradigm as of the date of its subsequent recording. *Franklin Financial v. White,* 932 So. 2d 434 (Fla. 4th DCA 2006).

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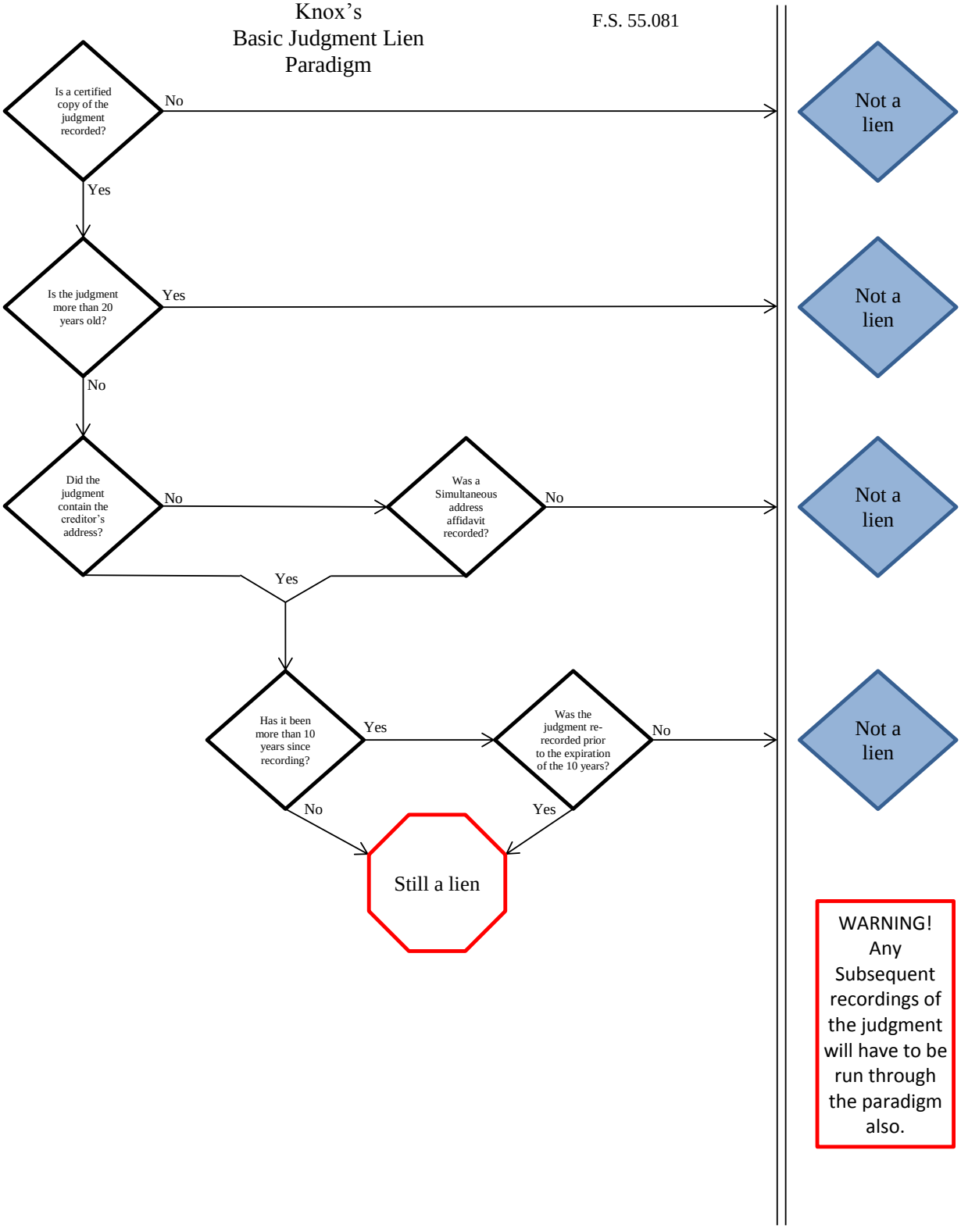

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Quick Solutions for insuring without an exception for estate tax liens

This tool is not comprehensive, dates of death prior to 2005 require further inquiry.
Detailed explanations are available in The Fund Title Notes SC 2.10

FLORIDA FIRST
Pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001, as amended, resident and nonresident decedents dying on and after Jan. 1, 2005, will not be subject to the Florida estate tax. **FLORIDA ESTATE TAXES ARE CLEARED WITH AN AFFIDAVIT OF NO ESTATE TAX DUE (See form DR-312 and DR-313)**

FEDERAL FAST –

Affidavit of no estate tax due (TN 2.10.08)
Recording of a **DR-312** is sufficient to clear state and federal estate taxes if the taxable estate was valued below the threshold in the year of the decedent's death.

2005: $1,500,000
2006 through 2008: $2,000,000
2009: $3,500,000
2010: $5,000,000 (or may elect a full exemption)
2011: $5,000,000
2012 – present: $5,000,000 indexed for inflation ***2015 $5,430,000***

Affidavit that transaction divests the lien
In certain circumstances, a sale to an arm's length bona fide purchaser for value divests the lien of estate taxes of a decedent who was a US Citizen:

- A sale by the decedent's surviving spouse as successor by right of survivorship (whether tenant by the entireties or otherwise) (TN 2.10.02, A.)
- A sale by a surviving joint tenant (without regard to marital status) (TN 2.10.02, B.)
- A sale by remainderman after death of life tenant (TN 2.10.06)
- A sale by a successor trustee or the beneficiaries of a trust (TN 2.10.10)
- A sale by the PR of the decedent's estate
  - Necessary to cover expenses of administration (TN 2.10.04)
  - After the death of the surviving spouse to clear the estate taxes of the FIRST spouse to die (TN 2.10.02)

Marital deduction: No requirement for estate tax clearance in sale by surviving spouse who elected the marital deduction; CMA must be recorded.

FOREIGN FAILS
Different rules apply in the case of the estate of a decedent who is not a citizen of the United States

1. There is a much lower threshold for the size of the estate necessitating the filing of a federal tax return: $60,000.00 of US assets in the gross estate (TN. 2.10.08)
2. Arm's length transfer to BFP for value doesn't divest the lien (See TN 2.10.02, TN 2.10.06, and TN 2.10.10)

When a method of quickly dispensing with the requirement to clear estate taxes is not available, consult the Title Notes for a more complete understanding and specific instructions, including but not limited to

TN 2.10.01 Assurance by Personal Representative of Ample Estate Funds to Pay Not Sufficient
TN 2.10.03 Estate Tax Liens Clearance, including procedures for obtaining a transaction specific release. See also Concept articles including those published June 2010 and Feb 2002
TN 2.10.08 Property Subject to — May Differ from Property Included in Administration — Estate Taxes.

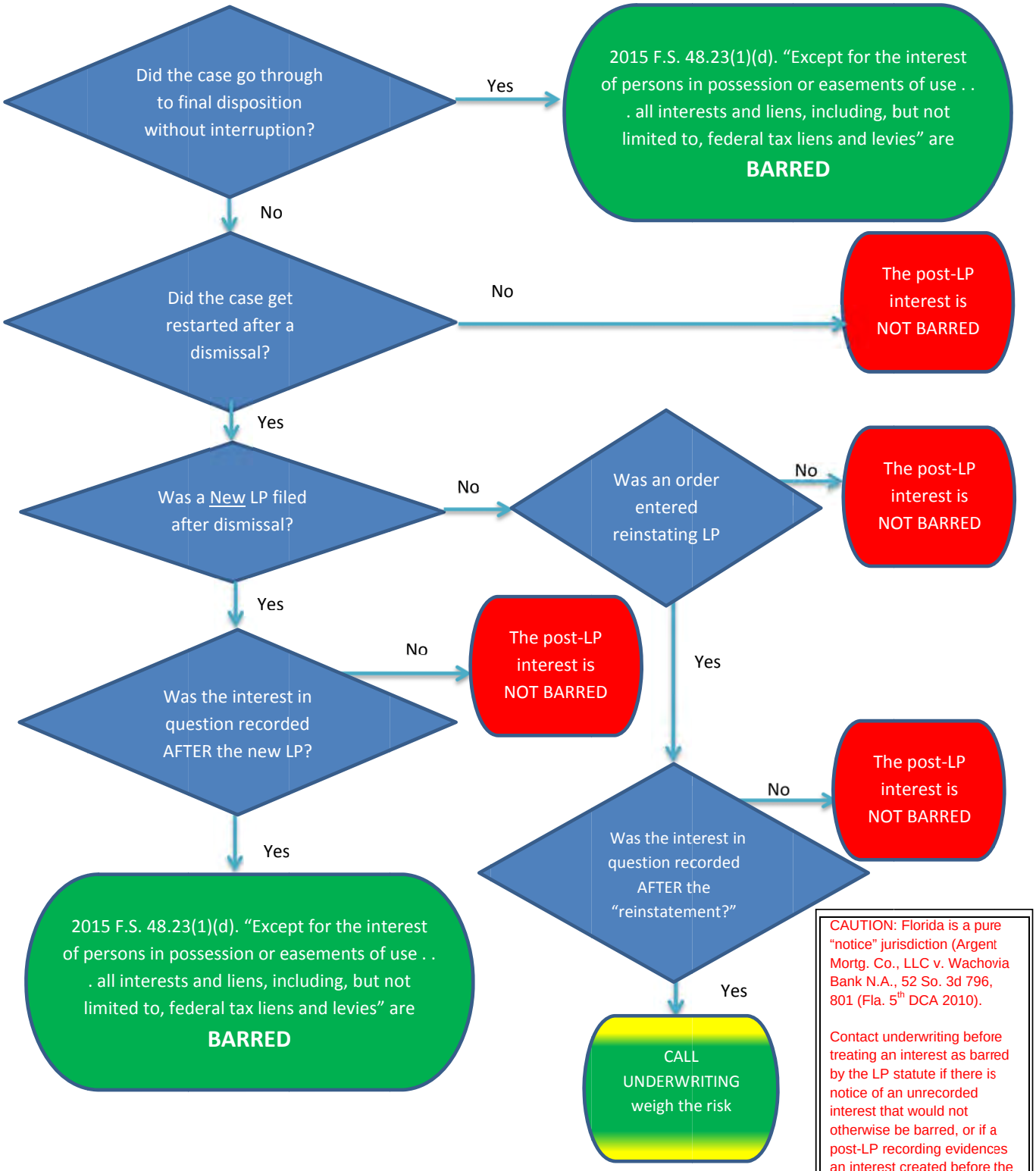
PROPER PROBATE

THIS TABLE IS ONLY A TOOL OFFERED AS A SUMMARY OF TYPICAL PROBATE TRANSACTIONS - IT IS NOT EXHAUSTIVE.

	General Requirements - calling probate GR-6.9 / mandating review of pleadings GR-6.11			
Type of Document	**Formal Admin - Testate**	**Formal Admin - Intestate**	**Summary Admin SC 2.01 estate value under $75k or DOD > 2yrs ago**	**Ancillary Admin SC 2.05 Formal 2.08.01 or Summary 2.01.01 Testate or intestate**
Death Certificate	strongly recommended TN 2.01.01	strongly recommended TN 2.01.01	strongly recommended TN 2.01.01	strongly recommended TN 2.05.04
Petition for Administration	N/A	REQUIRED (GR-6.12)	Intestate: REQUIRED GR-6.14 Testate: REQUIRED GR-6.15	If summary - required whether testate(GR-6.15) or intestate (GR6.14)
Florida Order Admitting the Will	REQUIRED (GR-6.13)	N/A	Testate: REQUIRED GR-6.15 but see TN 2.01.01 for alternative	Testate: REQUIRED GR-6.13
Last Will and Testament	REQUIRED (GR-6.13)	N/A	Testate: REQUIRED GR-6.15	Testate: REQUIRED GR-6.15
Letters of Administration	REQUIRED (GR-6.13)	REQUIRED (GR-6.12)	N/A	Testate: REQUIRED GR-6.13 Intestate: REQUIRED GR-6.12
Proper clearance of creditor's claims	May be required in narrow circumstances GR-6.6 TN 2.02.03	May be required in narrow circumstances GR-6.6 TN 2.02.03	May be required in narrow circumstances GR-6.6 TN 2.02.03	May be required in narrow circumstances GR-6.6 see TN 2.05.03 B.
Release of PR's personal lien on HX property	REQUIRED if property is HX and estate is open GR-6.10	REQUIRED if property is HX and estate is open GR-6.10	N/A	N/A
Proof of estate tax clearance	required (GR-6.7) unless transaction divests (GR-6.8) or estate is non-tax (TN 2.10.08)	required (GR-6.7) unless transaction divests (GR-6.8) or estate is non-tax (TN 2.10.08)	required (GR-6.7) unless transaction divests (GR-6.8) or estate is non-tax (TN 2.10.08)	required (GR-6.7) unless transaction divests (GR-6.8) or estate is non-tax (TN 2.10.08)
Order determining heirs	REQUIRED if HX was improperly devised GR-6.1 TN 2.05.01 (See also TN 2.03.04 for alternative)	may rely on the petition if there is no objection on or off record GR-6.1 TN 2.05.01 (See also TN 2.03.04 for alternative)	May rely on petition or affidavit See TN 2.01.01	May be required See TN 2.05.01 & 2.03.04
Order determining homestead	REQUIRED- can be avoided in certain circumstances GR-6.3 In N/A, then see GR-6.4	REQUIRED- can be avoided in certain circumstances GR-6.3 In N/A, then see GR-6.4	REQUIRED- can be avoided in certain circumstances GR-6.3 In N/A, then see GR-6.4	N/A
Order authorizing sale	May be required -is necessary only if not HX and will doesn't give PR power GR-6.2	only if not HX because PR has no jurisdiction of HX GR-6.2	N/A - see TN 2.01.01	REQUIRED for PR to convey if the will does not give the PR the power of sale (GR-6.2)
Order of Summary Administration	not in formal	not in formal	Intestate: REQUIRED GR-6.14 Testate: REQUIRED GR-6.15	If summary: see GR-6.14 & GR 6.15
Order discharging PR	May be required GR 6.13	May be required GR-6.12	N/A	If formal and admin complete: Testate GR-6.13 Intestate GR-6.12
Deed from heirs	Required - HX to heirs, or non-HX not clear, or HX not properly devised BUT SEE GR-6.5*	Required - HX to heirs, or non-HX not clear, or HX not properly devised BUT SEE GR-6.5	REQUIRED TN 2.01.01	May be required See TN 2.05.03 A.
Deed from devisees	May be required in testate (N/A in intestate administration): Required: when decedent's homestead was properly devised to a person who fits within the definition of an intestate heir, when the PR has recorded a certificate of distribution and a release of lien (all devisees even if distribution was to a subset of those devisees), and after the administration is completed if the PR has been dismissed without otherwise disposing of or distributing the subject property			
WHAT TO RECORD	TN 2.0 9.03	TN 2.09.03	TN 2.01.01	TN 2.01.01 OR 2.09.03

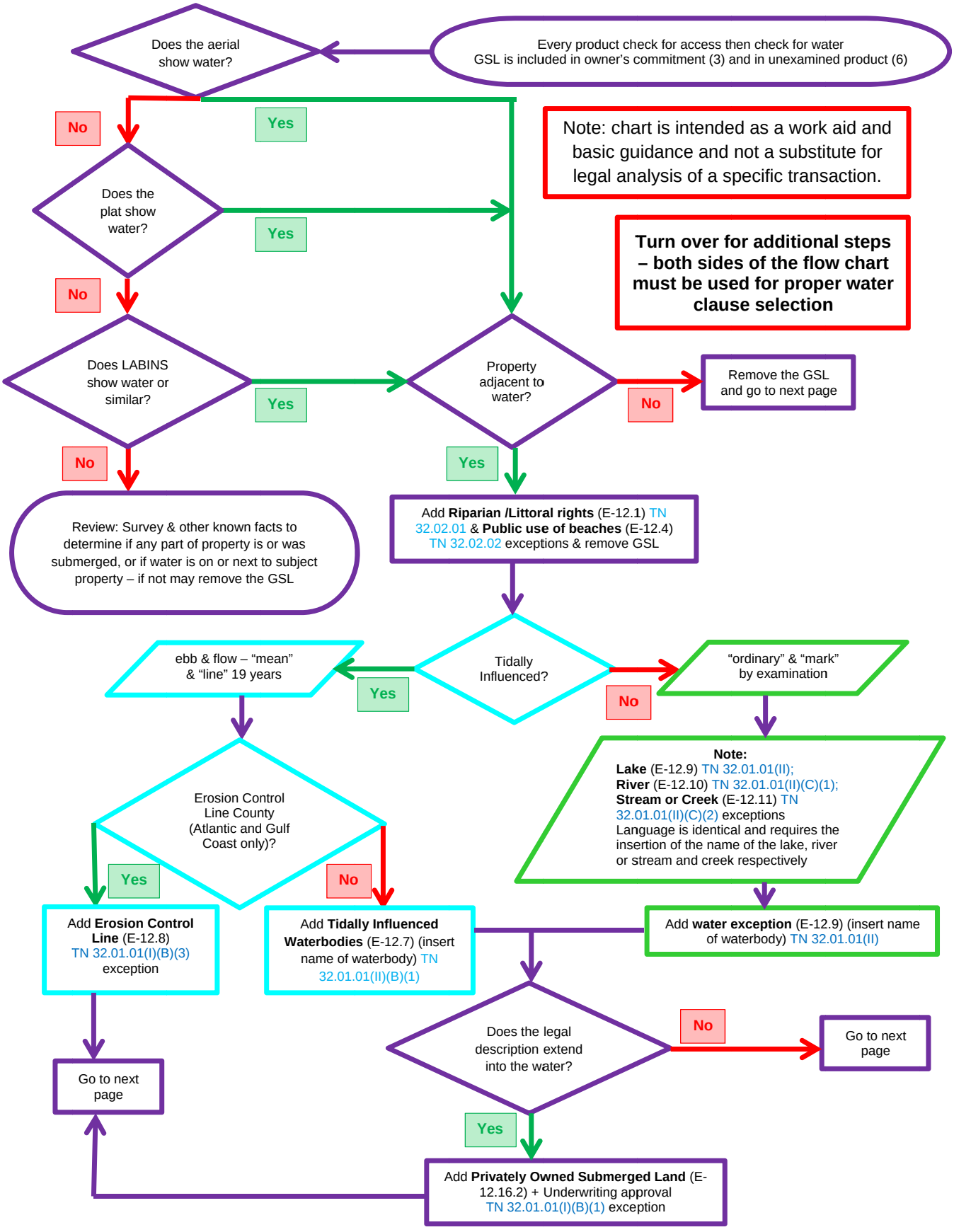
Evaluating a Lis Pendens, 48.23, Fla. Stat.

Deed, Judgment, Mortgage or similar instrument is recorded after a Lis Pendens but before the conclusion of the litigation. Does the LP statute bar the interest?



CAUTION: Florida is a pure "notice" jurisdiction (Argent Mortg. Co., LLC v. Wachovia Bank N.A., 52 So. 3d 796, 801 (Fla. 5th DCA 2010).

Contact underwriting before treating an interest as barred by the LP statute if there is notice of an unrecorded interest that would not otherwise be barred, or if a post-LP recording evidences an interest created before the LP.



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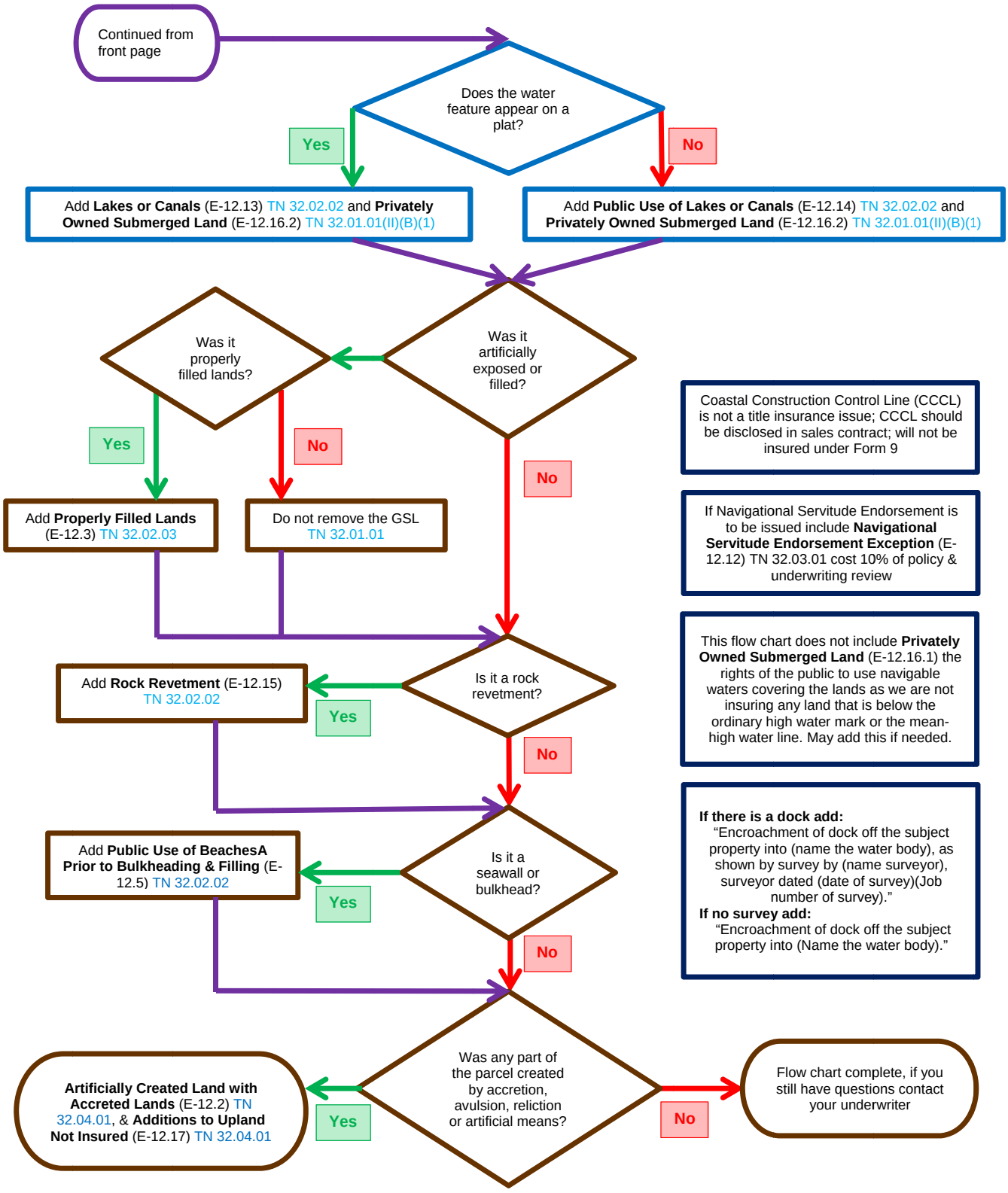

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Mortgage Modifications Rating

	No Loss of Priority	Loss of Priority	No Loss of Priority Plus Future Advance	Loss of Priority Plus Future Advance	Spreader
Mortgage Modification Endorsement to Existing ORNTIC Policy	No Premium	N/A	N/A	N/A	N/A
Form E Endorsement to Existing ORNTIC Policy	No Premium Used to Advance Effective Date	Substitution Loan Rates on Outstanding Principal Balance	Original Rates on New Money calculated at Graduated Rates	Sub Loan Rates on Outstanding Principal Balance Plus Original Rates on New Money calculated at Graduated Rates	Sub Loan Rates on Outstanding Principal Balance Plus Original Rates on New Money calculated at Graduated Rates
New Policy (not previously insured)	Original Rates (Reissue Rate if Applicable	Original Rates (Reissue Rate if Applicable)	Original Rates (Reissue Rate if Applicable)	Original Rates (Reissue Rate if Applicable)	Original Rates (Reissue Rate if Applicable)
New Policy (previously insured)	Substitution Loan Rates	Substitution Loan Rates	Substitution Loan Rates	Substitution Loan Rates	Substitution Loan Rates
FMG (Mortgage Priority Guaranty) – issued where prior policy is not an ORNTIC issued policy	$125.00	N/A	$125.00 with additional Stacked Policy at Original Rates	N/A	N/A
New Policy Issued Simultaneously with Owner's Policy (Owner's Policy rated at Original Rates)	Simultaneous issue rates up to the amount of the Owner's Policy	Simultaneous issue rates up to the amount of the Owner's Policy	Simultaneous issue rates up to the amount of the Owner's Policy	Simultaneous issue rates up to the amount of the Owner's Policy	Simultaneous issue rates attributable to the new parcel Plus Substitution Loan Rates on the Outstanding Principal Balance

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FUND ASSEMBLY 2016

CFPB PRACTICE TIPS PANEL EXPERT PANEL

RESIDENTIAL REAL ESTATE TRACK

Maggie Thumberg, Fund Sr. Underwriting Counsel &
Legal and Branch Education Manager
Anne L. Anastasi CLTP, NTP, First Vice President,
Old Republic National Title
Lew M. Oliver, III, Principal Attorney for Oliver Title Law in Orlando
Lindsay B. Harrison, Associate General Counsel at FBC Mortgage

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SPEAKER INFORMATION

CFPB PRACTICE TIPS PANEL EXPERT PANEL

Maggie Thumberg
Fund Sr. Underwriting Counsel & Legal and Branch Education Manager

Margaret Atkins Thumberg received her B.A. degree in history from the University of South Florida and her M.A. degree in history and J.D. degree from the University of Florida.

Ms. Thumberg is a Florida Bar Board Certified Real Estate Lawyer and has also been admitted to practice in the United States District Court for the Southern District of Florida. While at The Fund, she has presented hundreds of live seminars and Fundinars, including the New Member Training Program and has been a speaker at the 2011 and 2012 Affiliate Assemblies.

Ms. Thumberg is also the co-editor of The Fund's monthly publication, The Fund Concept. Prior to joining The Fund, she focused her practice in real estate and corporate matters including representation of lenders and developers in financing and acquisition matters and borrowers in foreclosure defense and bankruptcy.

Through Ms. Thumberg's representation of non-profit affordable housing developers, she prepared a practical guide to mortgage foreclosure mitigation counseling and presented numerous seminars on foreclosure related topics, including the Truth-in-Lending Act and Home Affordable Modification Program. Ms. Thumberg has also published an article on the Freedom of Information Act.

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Anne L. Anastasi, CLTP, NTP

First Vice President, Old Republic National Title

Over the past 3 years Anne has traveled the country teaching the provisions of ALTA Best Practices and the CFPB Integrated Mortgage Disclosure Rule to title agents, bar associations, Realtor® associations and the lending community. She continues her work with the ALTA task forces in its continuing effort to assist the title industry in the application of these major changes.

Anne served as President of the Pennsylvania Land Title Association for which she was the first female President in the Association's 80-year history and then as President of the American Land Title Association, the title industry's national association.

In her first few months of her tenure as ALTA president Anne testified before Congress, appeared on Cspan, held congressional briefings, met with Obama cabinet members and spoke to press outlets on the issues facing the real estate transfer system. She was referenced in the Washington Post as "someone to watch".

In 2012 Anne was featured during a segment of the Lifetime Television series Designing Spaces where she described the importance of the Owner's Title Insurance Policy and walked the viewers through the closing.

Anne currently heads the Agency Advantage Program for Old Republic Title.

Anne is a renowned national speaker covering topics such as title insurance, customer service, sales and motivation. She has been the key-note speaker at Realtor® conventions, bar association meetings, lender conferences and countless title industry gatherings.

Anne has recently published a book on the art of public speaking entitled, "Fearless Public Speaking" which has been reviewed as a "must-read" for all business people by Rick Wolff, Editorial Director for Warner Business Book.

Anne graduated with honors from Colgate University with a major in Japanese.

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Lew M. Oliver, III

Principal Attorney for Oliver Title Law in Orlando

Lew M. Oliver, III is the Principal Attorney for Oliver Title Law in Orlando. A graduate of Stetson University and Georgetown Law School, Lew practiced in Atlanta, Georgia for two years before moving to Orlando in 1986, where he joined both the Orlando City Attorney's Office and the Orange County Republican Executive Committee. There he was responsible for a variety of land use, real estate, economic development, historic preservation and code enforcement matters. He also served as general counsel for the Downtown Development Board and the Community Redevelopment Agency.

Lew left the City in 1992, but continued to serve as a consultant. He then began an independent real estate practice and simultaneously co-founded 2 high-tech companies in the medical device and maglev transportation sectors.

In 2002, Lew and a friend from law school founded Granet & Oliver, a successful law firm focused on real estate development and transactions. In 2007, he joined Osceola County Commissioner John Quinones at a new firm, Quinones & Oliver, PL (now Oliver Title Law), which specializes in commercial and residential real estate/title work as well as mediation.

Lew has been continuously active in the Republican Party since 1986 and has served in every major office of the local party, most recently as chairman for the last 16 years. He has also served in a variety of state party positions and campaign chair positions, including a seat on the Republican Party of Florida (RPOF) Executive Board for 10 years. In his spare time, Lew serves as Chairman of the Board of Trustees of Valencia Community College and as a Board Member of the National Association of Hispanic Real Estate Professionals Central Florida Chapter. He also likes to write awful science fiction, edit friends' novels, design smart-aleck t-shirts, and design ridiculously impractical homes.

Lindsay B. Harrison

Associate General Counsel at FBC Mortgage

Lindsay Harrison is Associate General Counsel at FBC Mortgage, LLC in Orlando.

Lindsay Hall Harrison is originally from Toronto, Canada by way of Portland, Oregon. Lindsay received her B.A. in Social Science from Portland State University and her Juris Doctor from Barry University School of Law in Orlando. Lindsay is licensed to practice law in Florida and is a member of the Florida Bar.

Lindsay has several years of experience in real estate investment management and has worked as a property manager. Lindsay formally held the position of litigation attorney for one of Florida's legacy law firms specializing in residential mortgage foreclosure for the lending and servicing industry. After stepping out and starting her own law firm, Lindsay's worked closely with buyer, seller, and real estate professionals in both transactional and litigation matters and handled residential real estate closings and settlements as owner of her own title company.

Lindsay is a recipient of the 2015 Florida Association of Women Lawyer's Leaders in the Law award and was also nominated as a 2015 Women Who Mean Business by Orlando Business Journal. She is a board member for the Central Florida Association for Women Lawyers, a former board member of the Women's Council of Realtors, Orlando Chapter, sits on the Advisory Board for a Gift for Music, and is a member of the Central Florida Real Estate Attorneys Counsel.

CFPB PRACTICE TIPS

Prepared by:
Lewis M. Oliver, III
Oliver Title Law
Orlando, Florida

- Be prepared for LOTS of due diligence from lenders, some of it quite extensive. Oliver Title Law (OTL) is aware of title companies that have been flagged, or placed on probation, or even banned from work with certain lenders, for violating certain requirements. Examples of typical requirements:
    - Employee theft insurance (often not included in your E&O).
    - Employee criminal background checks.
    - Locked file cabinets and locking up all files at night.
    - Disaster recovery plan in place for after fire/storm, etc.
    - Commit in writing to record docs and issue final policies quickly (typically within two weeks). E-filing STRONGLY recommended.
    - Block public access to areas where files are located.
    - Many lenders require approvals from 3rd party "best practice" compliance vendors. OTL knows of at least three of these.
    - So far no one has required e-mail encryption from OTL, though it is prepared if required.
    - Some lenders and compliance vendors have warned of surprise inspections. So far none have visited OTL.
- Most lenders appear to be complying with minimum three-day advance delivery of Closing Disclosure (CD). Almost all buyers report that they have seen the CD in advance. VERY FEW buyers review anything but the first page. Typically they look only at the interest rate, monthly payment, fees and cash to close.
- Settlement/title agents have NO RESPONSIBILITY to ensure compliance with advance CD delivery requirements. That is entirely the lender's responsibility. Also, do NOT object if the lender does not appear to have met the three-day rule or borrower hasn't seen the CD in advance.

- Almost no lenders are using the seven-day mailbox rule for advance CD disclosure. 95% of the time they use the three-day option (hand delivery or secure portal).

- The most confusing parts of Page 1 of the CD to buyers are (a) the column showing payments for years 1-30 (or 1-10, then 11-30, etc.) and (b) the box showing the total monthly taxes, insurance and association assessments. The payment columns suggest to some that the TOTAL "PITI" payment will in fact be constant for the whole life of the loan when it typically will NOT (except where there is no PMI or escrows).

- Some lenders are checking the box on Page 5 of the Buyer CD that says the lender CANNOT pursue a deficiency post-foreclosure. This appears to be a very widespread error (and I think it is CLEARLY an error).

- Lenders sometimes (maybe 10-25% of the time?) do ***not COMPLETELY finalize*** the CD three days in advance. They might leave some details to be sorted out closer to closing, including just about anything not lender-related and/or not related to the APR (examples: association costs, seller credits, pro-rations, home warranties, real estate broker transaction fees). OTL is therefore STILL sometimes modifying Lender CDs right up until closing. Some lenders have figured out that if changes do not impact the APR more than 1/8% (.125%), they can leave it to the last minute. This is gradually improving, but is still happening occasionally.

- Only 30-40% of lenders send the rest of the complete packages three days in advance. OTL still often waits right up until that last minute for the complete package.

- MOST Lenders have us prepare the ***Seller*** CD, although a few do it themselves. ALMOST ALL lenders want a signed or initialed Seller CD.

- MOST lenders are using the portals RARELY, and then ONLY to deliver the CD or closing package. The vast majority of document deliveries and communications are still typically via phone or regular e-mail.

- It is still quite common for the CD to be issued to buyer in time for the closing date, but STILL have the closing delayed ***beyond that*** for other lender reasons.

- Also, note that the rule requires AT LEAST three day's advance delivery of the CD, not EXACTLY three days. It is OK if the closing drifts to a time LATER than three days after delivery without a new CD.

- The “dream scenario” of title agents uploading key CD figures to the major portals used by lenders, and then having the lenders simply import those figures seamlessly onto their own CD remains just that: a dream. OTL is aware of NO lenders that are currently only using portals. Instead, they are taking data from OTL’s e-mails and manually entering the information on their own, just like always.

- NO lenders have asked OTL to prepare the Buyer CD, though MOST lenders ask OTL to send them “draft CD’s.”

- Lenders have at least three ways to deal with the “title insurance tango” in seller-pays jurisdictions:

    - Charge most of it to buyer on Page 2, and then have seller give a credit back on Page 3. This is most common.

    - Charge only the direct mortgagee policy expenses to buyer on Page 2, then have seller pay the remainder on Page 2. This is next most common.

    - Hybrid of the above two, with buyer paying MORE than the mortgagee rate, but LESS than the owner rate, with seller giving back the credit for the excess over the mortgagee charges.

- The title insurance tango has been somewhat messy but not as catastrophic as many had feared.

- Importantly, OTL has seen NO movement toward pressure by lenders to use their own title providers, and no pushback at all on fees. Lenders typically want a local liaison with real estate licensees, buyers and sellers, and are happy to deal with competent title experts.

- Be sure to order estoppels and title work to come back two weeks before close. Not all lenders want all of that two weeks in advance (many don’t), but a significant number do, and a large majority want their commitment and CPL that far in advance.

- Estoppels remain a serious problem. Since OTL rarely knows FOR SURE how long they will take to receive, or how long they will be good for once received, there is often no choice but to either spend extra money on rush orders or on updates. It is VERY hard to time them perfectly so they arrive two weeks before close but will still be valid for two weeks.

- OTL does not give borrower CDs to real estate licensees or sellers. OTL DOES give out “matching” ALTA settlement statements in the alternative. Also, if OTL sees something wrong or missing on the lender CD, the parties are notified of that without actually sending the CD.

- It has been suggested that closing agents ask buyers in closings if it is OK if others sit in on the closing (for privacy reasons). No lender has ever suggested or required this, and OTL does not believe it is in fact REQUIRED, but OTL now does it anyway – in a written form - in an excess of caution. So far, buyers do not care who sits in. The only data that most buyers consider remotely private is credit scores (if shown). OTL suggests you not read SSNs or credit scores aloud if others are at the closing.

American Land Title Association

ALTA Settlement Statement - Combined
Adopted 05-01-2015

File No./Escrow No.:
Print Date & Time:
Officer/Escrow Officer:
Settlement Location:

Title Company Name
ALTA Universal ID
Title Company Address

Title Company Logo

Property Address:
Buyer:
Seller:
Lender:

Settlement Date:
Disbursement Date:
Additional dates per state requirements:

Seller		Description	Borrower/Buyer	
Debit	**Credit**		**Debit**	**Credit**
		Financial		
		Sales Price of Property		
		Personal Property		
		Deposit including earnest money		
		Loan Amount		
		Existing Loan(s) Assumed or Taken Subject to _____		
		Seller Credit		
		Excess Deposit		
		Prorations/Adjustments		
		School Taxes from (date) to (date)		
		County Taxes from (date) to (date)		
		HOA dues from (date) to (date)		
		Seller Credit		
		Loan Charges to (lender co.)		
		Points		
		Application Fee		
		Origination Fee		
		Underwriting Fee		
		Mortgage Insurance Premium		
		Prepaid Interest		

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File #
Printed on (date) at (time)

		Other Loan Charges		
		Appraisal Fee to _____		
		Credit Report Fee to _____		
		Flood Determination Fee to _____		
		Flood Monitoring Fee to _____		
		Tax Monitoring Fee to _____		
		Tax Status Research Fee to _____		
		Impounds		
		Homeowner's Insurance _____ mo @ $ _____/mo		
		Mortgage Insurance _____ mo @ $ _____/mo		
		City/town taxes _____ mo @ $ _____/mo		
		County Taxes _____ mo @ $ _____/mo		
		School Taxes _____ mo @ $ _____/mo		
		Aggregate Adjustment		
		Title Charges & Escrow / Settlement Charges		
		Owner's Title Insurance ($ amount) to _____		
		Owner's Policy Endorsement(s) _____		
		Loan Policy of Title Insurance ($ amount) to _____		
		Loan Policy Endorsement(s) _____		
		Title Search to _____		
		Insurance Binder to _____		
		Escrow / Settlement Fee to _____		
		Notary Fee to _____		
		Signing Fee to _____		
		Commission		
		Real Estate Commission to _____		
		Real Estate Commission to _____		
		Other		
		Government Recording and Transfer Charges		
		Recording Fees (Deed) to _____		
		Recording Fees (Mortgage/Deed of Trust) to _____		
		Recording Fees (Other) to _____		
		Transfer Tax to _____		
		Transfer Tax to _____		
		Payoff(s)		
		Lender: Payoff Lender Co.		
		Principal Balance ($ amount)		
		Interest on Payoff Loan ($ amount/day)		
		Additional Payoff fees/Reconveyance Fee/Recording Fee/Wire Fee		
		Lender: Payoff Lender Co.		
		Principal Balance ($ amount)		

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		Interest on Payoff Loan ($ amount/day)		
		Additional Payoff fees/Reconveyance Fee/Recording Fee/Wire Fee		
		Miscellaneous		
		Pest Inspection Fee to _____		
		Survey Fee to _____		
		Homeowner's insurance premium to _____		
		Home Inspection Fee to _____		
		Home Warranty Fee to _____		
		HOA dues to _____		
		Transfer fee to Management Co.		
		Special Hazard Disclosure		
		[Utility] Payment to _____		
		Assessments		
		School Taxes		
		City/town taxes		
		County Taxes/County Property taxes		
		Buyer Attorney fees to _____		
		Seller Attorney fees to _____		
Seller			**Borrower/Buyer**	
Debit	**Credit**		**Debit**	**Credit**
		Subtotals		
		Due From/To Borrower		
		Due From/To Seller		
		Totals		

Acknowledgement

We/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction and further certify that I have received a copy of the ALTA Settlement Statement. We/I authorize _____*title company name*_____ to cause the funds to be disbursed in accordance with this statement.

_____
Buyer

_____
Buyer

_____
Seller

_____
Escrow Officer

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File #
Printed on (date) at (time)

American Land Title Association

ALTA Settlement Statement - Borrower/Buyer
Adopted 05-01-2015

File No./Escrow No.:
Print Date & Time:
Officer/Escrow Officer:
Settlement Location:

Title Company Name
ALTA Universal ID
Title Company Address

Title Company Logo

Property Address:
Buyer:
Seller:
Lender:

Settlement Date:
Disbursement Date:
Additional dates per state requirements:

Description	Borrower/Buyer	
	Debit	**Credit**
Financial		
Sales Price of Property		
Personal Property		
Deposit including earnest money		
Loan Amount		
Existing Loan(s) Assumed or Taken Subject to _____		
Seller Credit		
Excess Deposit		
Prorations/Adjustments		
School Taxes from (date) to (date)		
County Taxes from (date) to (date)		
HOA dues from (date) to (date)		
Seller Credit		
Loan Charges to (lender co.)		
Points		
Application Fee		
Origination Fee		
Underwriting Fee		
Mortgage Insurance Premium		
Prepaid Interest		

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File #
Printed on (date) at (time)

Other Loan Charges		
Appraisal Fee to _____		
Credit Report Fee to _____		
Flood Determination Fee to _____		
Flood Monitoring Fee to _____		
Tax Monitoring Fee to _____		
Tax Status Research Fee to _____		
Impounds		
Homeowner's Insurance _____ mo @ $ _____/mo		
Mortgage Insurance _____ mo @ $ _____/mo		
City/town taxes _____ mo @ $ _____/mo		
County Taxes _____ mo @ $ _____/mo		
School Taxes _____ mo @ $ _____/mo		
Aggregate Adjustment		
Title Charges & Escrow / Settlement Charges		
Owner's Title Insurance ($ amount) to _____		
Owner's Policy Endorsement(s) _____		
Loan Policy of Title Insurance ($ amount) to _____		
Loan Policy Endorsement(s) _____		
Title Search to _____		
Insurance Binder to _____		
Escrow / Settlement Fee to _____		
Notary Fee to _____		
Signing Fee to _____		
Commission		
Real Estate Commission to _____		
Real Estate Commission to _____		
Other		
Government Recording and Transfer Charges		
Recording Fees (Deed) to _____		
Recording Fees (Mortgage/Deed of Trust) to _____		
Recording Fees (Other) to _____		
Transfer Tax to _____		
Transfer Tax to _____		
Payoff(s)		
Lender: Payoff Lender Co.		
Principal Balance ($ amount)		
Interest on Payoff Loan ($ amount/day)		
Additional Payoff fees/Reconveyance Fee/Recording Fee/Wire Fee		
Lender: Payoff Lender Co.		
Principal Balance ($ amount)		

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File #
Printed on (date) at (time)

Interest on Payoff Loan ($ amount/day)		
Additional Payoff fees/Reconveyance Fee/Recording Fee/Wire Fee		
Miscellaneous		
Pest Inspection Fee to _____		
Survey Fee to _____		
Homeowner's insurance premium to _____		
Home Inspection Fee to _____		
Home Warranty Fee to _____		
HOA dues to _____		
Transfer fee to Management Co.		
Special Hazard Disclosure		
[Utility] Payment to _____		
Assessments		
School Taxes		
City/town taxes		
County Taxes/County Property taxes		
Buyer Attorney fees to _____		
Seller Attorney fees to _____		
	Debit	**Credit**
Subtotals		
Due From/To Borrower		
Due From/To Seller		
Totals		

Acknowledgement

We/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction and further certify that I have received a copy of the ALTA Settlement Statement. We/I authorize _____*title company name*_____ to cause the funds to be disbursed in accordance with this statement.

_____
Borrower

_____
Borrower

_____
Escrow Officer

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American Land Title Association	ALTA Settlement Statement - Seller Adopted 05-01-2015

File No./Escrow No.: Print Date & Time: Officer/Escrow Officer: Settlement Location:	**Title Company Name** **ALTA Universal ID** **Title Company Address**	Title Company Logo

Property Address:
Buyer:
Seller:
Lender:

Settlement Date:
Disbursement Date:
Additional dates per state requirements:

Description	Seller	
	Debit	**Credit**
Financial		
Sales Price of Property		
Personal Property		
Deposit including earnest money		
Loan Amount		
Existing Loan(s) Assumed or Taken Subject to _____		
Seller Credit		
Excess Deposit		
Prorations/Adjustments		
School Taxes from (date) to (date)		
County Taxes from (date) to (date)		
HOA dues from (date) to (date)		
Seller Credit		
Loan Charges to (lender co.)		
Points		
Application Fee		
Origination Fee		
Underwriting Fee		
Mortgage Insurance Premium		
Prepaid Interest		

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File #
Printed on (date) at (time)

Other Loan Charges		
Appraisal Fee to _____		
Credit Report Fee to _____		
Flood Determination Fee to _____		
Flood Monitoring Fee to _____		
Tax Monitoring Fee to _____		
Tax Status Research Fee to _____		
Impounds		
Homeowner's Insurance _____ mo @ $ _____/mo		
Mortgage Insurance _____ mo @ $ _____/mo		
City/town taxes _____ mo @ $ _____/mo		
County Taxes _____ mo @ $ _____/mo		
School Taxes _____ mo @ $ _____/mo		
Aggregate Adjustment		
Title Charges & Escrow / Settlement Charges		
Owner's Title Insurance ($ amount) to _____		
Owner's Policy Endorsement(s) _____		
Loan Policy of Title Insurance ($ amount) to _____		
Loan Policy Endorsement(s) _____		
Title Search to _____		
Insurance Binder to _____		
Escrow / Settlement Fee to _____		
Notary Fee to _____		
Signing Fee to _____		
Commission		
Real Estate Commission to _____		
Real Estate Commission to _____		
Other		
Government Recording and Transfer Charges		
Recording Fees (Deed) to _____		
Recording Fees (Mortgage/Deed of Trust) to _____		
Recording Fees (Other) to _____		
Transfer Tax to _____		
Transfer Tax to _____		
Payoff(s)		
Lender: Payoff Lender Co.		
Principal Balance ($ amount)		
Interest on Payoff Loan ($ amount/day)		
Additional Payoff fees/Reconveyance Fee/Recording Fee/Wire Fee		
Lender: Payoff Lender Co.		
Principal Balance ($ amount)		

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File #
Printed on (date) at (time)

Interest on Payoff Loan ($ amount/day)		
Additional Payoff fees/Reconveyance Fee/Recording Fee/Wire Fee		
Miscellaneous		
Pest Inspection Fee to _____		
Survey Fee to _____		
Homeowner's insurance premium to _____		
Home Inspection Fee to _____		
Home Warranty Fee to _____		
HOA dues to _____		
Transfer fee to Management Co.		
Special Hazard Disclosure		
[Utility] Payment to _____		
Assessments		
School Taxes		
City/town taxes		
County Taxes/County Property taxes		
Buyer Attorney fees to _____		
Seller Attorney fees to _____		
	Debit	**Credit**
Subtotals		
Due From/To Borrower		
Due From/To Seller		
Totals		

Acknowledgement

We/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction and further certify that I have received a copy of the ALTA Settlement Statement. We/I authorize _____*title company name*_____ to cause the funds to be disbursed in accordance with this statement.

_____

Seller

_____

Escrow Officer

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Information Center

Authorized Agent Program Available Through Old Republic

The Fund, through Old Republic, is pleased to announce the availability of our Authorized Agent Program. This program, in conjunction with our Members' efforts to comply with the American Land Title Association's Best Practices, should provide lenders, clients, customers and consumers additional confidence and comfort that the title settlement transactions you process are done the right way, with integrity and ethics.

As a Member of The Fund, you are aware of our strong Risk Management program. We require an annual self-assessment and a certain number of our Members undergo either a desk or office audit each year. Our Risk Management procedures are endorsed by Old Republic National Title Insurance Company (Old Republic).

In the new environment under the "Know Before You Owe" regulations (TRID), lenders are very focused on ensuring that the closing agent handling a loan transaction is responsible and competent. Documenting this is a challenge for the lenders and they each have their own set of rules. Many of you have been struggling with how to comply with lender requests for vetting of your firm or agency, third-party certification of your office procedures and other similar requests.

The Fund, through Old Republic, is pleased to announce the availability of our Authorized Agent Program.

This program, in conjunction with our Members' efforts to comply with the American Land Title Association's Best Practices, should provide lenders, clients, customers and consumers additional confidence and comfort that the title settlement transactions you process are done the right way, with integrity and ethics. The goal is to continue to allow you to "show what you know" and exemplify a high level of trust resulting in a positive experience for all involved in mortgage lending and real estate transactions.

We fully expect the Authorized Agent Program will evolve and improve over the next several months. We will keep you informed as enhancements are made. For now, if you would like to request the Authorized Agent Letter for your use, please request one by email to authorizedagentletter@thefund.com (mailto:authorizedagentletter@thefund.com?subject=Authorized%20Agent%20Letter%20Request).

12/15/2015 1:46:15 PM

TRID, Closing Disclosure and Florida Insurance Premium Rule FAQs

(Updated Mar. 17, 2016)

NOTE: This document does not include FAQs specific to DoubleTime®. DoubleTime® FAQs can be found HERE on The Fund website in the DoubleTime® Support Center.

NOTE: ***Lenders may have a different interpretation of the answers to these FAQs. Lender instructions should normally be followed since they are responsible for the content of the CD. Document any disagreements you have with lender instructions that are at odds with your interpretation.***

TRID Rule Interpretation

T1. Which loans are covered under the new law requiring the Closing Disclosure?

T2. If it is a cash deal, will the Closing Disclosure have only two pages? What if it is a commercial deal?

T3. Are time share sales covered by the new rules?

T4. How will a reverse mortgage be reflected as loan amounts, interest rates and life of borrower are uncertain?

T5. Do we count Saturday when applying the mail box rule if the bank is closed on Saturday?

T6. If a new service is requested after the Closing Disclosure has been delivered does a new Loan Estimate have to be given to the borrower?

T7. Can we provide a copy of the Closing Disclosure to realtors?

T8. Do the new TRID rules apply to an assumption of mortgage?

T9. Is there a timeframe for the seller to receive the Seller's Closing Disclosure?

T10. Can a buyer be "forced" to use the services of lender's selected settlement agent?

T11. Is my transaction covered by TRID Rules?

T12 What closing statements can I provide to the real estate broker and other third parties?

T13. There is a first and a second mortgage in my transaction. Can I show both mortgages on one closing disclosure?

T14. Where and how should I disclose the Florida policy surcharge (currently $3.28) on the Closing Disclosure?

T15. If a lender on a commercial transaction requires a mortgage on one of the parties' residences, does that mortgage fall under the provisions and requirements of TRID?

T16. Do the provisions of the Rule apply to second mortgages?

T17. When a transaction has two simultaneous mortgages are one or two Closing Disclosures used?

T18. May lenders charge application fees or fees for pre-approvals?

T19. What are the six elements that trigger a loan application has been received and then requires the lender issue the Loan Estimate within three business days?

T20. Who prepares the borrower's Closing Disclosure form?

T21. How much of a change to the APR is allowable without triggering a new three-day review period?

T22. I thought that the whole process was that NOTHING changed after the delivery of the Closing Disclosure.

T23. If the closing is a "mail away" we usually need the package ready several days before closing. Does the three-day time period also apply to the closing documents from the lender or is it just the Closing Disclosure?

T24. How do I handle the situation if the consumer states that they never received the Closing Disclosure?

T25. If a consumer writes a statement specifically waiving their right to the three-day review is there a provision to allow for this?

T26. Do the regulations in the Rule affect the three-day right of rescission on refinances or do the borrowers get three days prior to signing plus three days after?

T27. When a transaction closes late in a calendar year, the lender often requires the full payment of the current year's property tax bill. Where should that payment be disclosed on the Closing Disclosure?

T28. Where will we show payments to construction subcontractors on the Closing Disclosure? What if there aren't enough lines?

T29. Where are the buyer's and seller's signature lines on the Closing Disclosure?

T30. What are the procedures when something changes after closing?

T31. Where can I read the new regulations?

T32. Do I have to provide a Closing Disclosure form to the seller? (Why can't I just give them a HUD-1, ALTA Settlement Statement, or some other "easy" form?)

T33. Must private lenders provide borrowers with loan estimates and closing disclosures?

Closing Disclosure Functionality

C1. Is there going to be a special "worksheet" to calculate the credit to the Buyer for the title fees in a contract where the seller pays for the owners' policy?

C2. If there are miscellaneous affidavits needed to clear the title, are they included in Line 01 (Recording Fees)? Does it matter if they are the seller's responsibility?

C3. Do e-recording fees paid to a third party get lumped in with all other recording fees on Line 01 (Recording Fees) of Section E (Taxes and Other Government Fees)?

C4. What if there is an error in disclosing closing costs? For example, what if a seller is charged for documentary stamps but it should be buyer's expense? Does the three-day period restart?

C5. Does a change to closing costs or change in cash to close require a revision to the Closing Disclosure to restart the three-day period?

C6. In certain circumstances, a charge attributable to Buyer may become apparent after CD has been delivered (i.e. HOA fee attributable to the Buyer). How will the lender learn of this and will such a change require a new three-day waiting period?

C7. Will the Lender answer shop or not shop questions or is closing agent to determine these issues?

C8. How do we calculate Down Payment/Funds from Borrower in the Calculating Cash to Close table on page 3 of the Closing Disclosure?

C9. What happens if at the walk-through (closing date or the day before), the seller agrees to give a credit to buyer?

C10. What if we don't want our FL license ID number disclosed under contact information on the Closing Disclosure?

C11. What identification number should be used for the individual in the contact information table?

C12. What identification number should be used for the entity in the contact information table?

C13. What should we be using as a disbursement sheet?

C14. Can we put signature lines on a separate page if needed?

C15. Why aren't there any tables on the bottom of my borrower's Closing Disclosure page four?

C16. Where should I disclose the Florida policy surcharge (currently $3.28) on the Closing Disclosure?

C17. How do I charge and collect eRecording fees?

C18. How are charges for municipal lien searches (and similar searches) shown on the closing statement or Closing Disclosure?

C19. Am I permitted to separately itemize and disclose Closing Insight® transaction fees on the CD?

C20. How do I give a "Butler Rebate"?

C21. How do I show a reissue credit?

C22. Can I itemize association estoppel fees?

C23. Which line and what number do I put in the Contact Information table for real estate agents?

C24. Why is the Owner's policy listed in the "Other" Section (Section H)?

C25. How is title insurance premium calculated and disclosed on the Closing Disclosure?

Florida Rules

F1. Have the FR/Bar and FAR contracts been amended to address these new rules?

F2. Why did the Florida Department of Financial Services adopt this new rule?

F3. Where can I get a copy of the new DFS-H1-2146 form?

F4. What do I do with the form once it is completed?

F5. How do I complete the Settlement Agent Certification box?

F6. How do I complete the table on the form?

F7. Can I edit the form?

F8. Are attorneys who do not issue title insurance through a title insurance agency required to follow the rule?

F9. When must I use the new form?

F10. When issuing owner and loan policies, what premium amount should we show on Schedule A for each policy?

F11. Why am I being asked to provide a preliminary HUD before a loan has been approved? Should I provide one?

F12. Where do I put the $3.28 surtax on form DFS-H1-2146?

F13. Where should I send the $3.28 surcharge?

TRID Interpretation

T1. Which loans are covered under the new law requiring the Closing Disclosure?

A. Most consumer mortgages. Exceptions include reverse mortgages, open-ended loans such as HELOCS, loans for business, commercial, or agricultural purposes, and loans made to other than natural persons.

T2. If it is a cash deal, will the Closing Disclosure have only two pages? What if it is a commercial deal?

A. The Closing Disclosure is only required and designed to be used for transactions which include a mortgage. Commercial transactions are exempt from its required use if the mortgage loan is "primarily" for business, commercial or agricultural purposes.

Although there is no prohibition from using the Closing Disclosure for cash and commercial transactions, you may use any form you wish for those transactions including the custom settlement statements found in DoubleTime®, the new ALTA designed forms, or the original two-page HUD-1(1974 version).

T3. Are time share sales covered by the new rules?

A. If the time share purchase includes a mortgage transaction which is considered to be a Covered Loan the new rules apply. However, the transaction is specifically exempted from having to comply with the three business day before closing rule related to delivery of the Closing Disclosure.

T4. How will a reverse mortgage be reflected as loan amounts, interest rates and life of borrower are uncertain?

A. Reverse mortgages are not subject to the new TILA-RESPA Integrated Disclosure rules. Those loans will continue to be governed by Good Faith Estimates, HUD-1 settlement statements, and Truth in Lending disclosures.

T5. Do we count Saturday when applying the mail box rule if the bank is closed on Saturday?

A. Yes, except for those occasions when your Saturday is one of the four federal holidays which falls on a day which floats from year to year (New Year's Day, Independence Day, Veterans Day, and Christmas Day). In that case Saturday is not counted, but the day on which the holiday might be observed is counted even though government offices and banks are closed and regular mail service is suspended.

Other than the exception for federal holidays, it makes no difference if the bank is closed on Saturday as far as counting the days related to receipt of the Closing Disclosure including the mail box rule.

T6. If a new service is requested after the Closing Disclosure has been delivered does a new Loan Estimate have to be given to the borrower?

A. Once a Closing Disclosure has been delivered there will never be another Loan Estimate. New services will be only be disclosed on the Closing Disclosure.

T7. Can we provide a copy of the Closing Disclosure to realtors?

A. Realtors generally request signed HUD-1 closing statements for their files. Associations sometimes request them as well. Sharing the borrower's CD with third parties, however, should be limited to those situations where you have both lender and borrower permission.

Unlike the HUD-1, the CD is created by the lender and the lender has ownership rights to it. For that reason, their approval is needed. In addition, since the CD contains far more Non-public Personal Information (NPI), caution should be exercised and borrower approval obtained before sharing it with others.

A better solution is to provide the seller's CD which you will prepare. In the rare event the borrower has paid for all or part of the real estate brokerage services, get permission and provide the borrower CD; or provide your own combined settlement statement which only reflects settlement charges.

T8. Do the new TRID rules apply to an assumption of mortgage?

Generally speaking, yes. TRID rules apply to an assumption provided the following three elements are present: 1) it is a residential mortgage; 2) the creditor expresses their acceptance of the new consumer; and 3) there is a written agreement (See 12 CFR 1026.20(b) and associated commentary).

Noteworthy is that the approval of creditworthiness, notification of change of records, mailing of a new coupon book, and acceptance of payments from the new consumer do not in and of themselves constitute the express agreement to accept the new consumer as required.

T9. Is there a timeframe for the seller to receive the Seller's Closing Disclosure?

A. The Seller's Closing Disclosure must be provided to the seller no later than the day of closing. You can provide it as early as you want, but there is no three-day rule like there is for the borrower's form.

T10. Can a buyer be "forced" to use the services of lender's selected settlement agent?

A. Yes. The lender can require the borrower to use a lender-selected provider. (This is not new under TRID. It was also the case for the GFE/HUD, though it rarely occurred.)

The lender can choose the provider; the lender can give the borrower a list of at least two providers and restrict the borrower's choice to that list; or the lender can give the provider a list of at least one provider and allow the borrower to choose from the list or find a provider on their own ("shop").

Even when the borrower chooses someone, the lender can still deny use of that provider when the provider is not on the lender's internal approved list. (E.g. settlement agent has no access to Closing Insight or other collaboration portal as required by the lender; has failed to meet the lender's "Best Practices" requirements, etc.)

T11. Is my transaction covered by TRID Rules?

A. Most consumer mortgage loan closings are covered. Exceptions include reverse mortgages, open-ended loans such as HELOCS, loans for business, commercial, or agricultural purposes, and loans made to other than natural persons. Let me state the obvious: cash deals are not covered by TRID. The Closing Disclosure is only required and designed to be used for transactions which include a mortgage. Commercial transactions are exempt from its required use if the mortgage loan is "primarily" for business, commercial or agricultural purposes. Although there is no prohibition from using the Closing Disclosure for cash and commercial transactions, you may use any form you wish for those transactions including the custom settlement statements found in DoubleTime®, the new ALTA designed forms, or the original two-page HUD-1(1974 version).

T12. What closing statements can I provide to the real estate broker and other third parties?

A. Unlike the HUD-1, the Closing Disclosure is created by the lender and the lender has ownership rights to it. For that reason, their approval is needed. In addition, since the Closing Disclosure contains far more Non-public Personal Information (NPI), caution should be exercised and borrower approval obtained before sharing it with others.

A better solution is to prepare a joint closing statement such as the ALTA statement or the custom settlement statements found in DoubleTime® and other closing software. The general sense is that these can be provided to real estate brokers without significant concern.

The TRID rules require that the settlement agent prepare and provide a Seller Closing Disclosure. There is no reason to give that to anyone other than the seller if you have prepared another joint closing statement but there is no NPI concern about the Seller Closing Disclosure.

T13. There is a first and a second mortgage in my transaction. Can I show both mortgages on one closing disclosure?

A. Lenders have the option of having the second loan disclosed on a separate document, or they can include it on the Closing Disclosure for the first mortgage. If shown on a separate document, it would not necessarily be on a Closing Disclosure. For example, because a HELOC is an "open-end" loan transaction, it could be disclosed using a HUD-1 type document or settlement statement. Only "closed-end" loan transactions are covered by the new rules and must use the Closing Disclosure unless they qualify for some other exemption.

If the lender wants to include everything on one Closing Disclosure, we believe the separate charges related to the second loan should be disclosed in "Section H. Other;" but the lender has the discretion to request itemization elsewhere.

T14. Where and how should I disclose the Florida policy surcharge (currently $3.28) on the Closing Disclosure?

A. The policy surcharge required by Sec. 627.7865, F.S. is described in Sec. 631.401(2), F.S. as a "governmental assessment." As such it should be disclosed in "Section E. Taxes and Other Government Fees." There is no hard and fast rule as to how it should be described on the Closing Disclosure, but it must include the reference "State of Florida" as the payee following the word "to" on that line. **HOWEVER, THIS DOES NOT CHANGE THE REQUIREMENT THAT THE SURCHARGE BE DISBURSED TO THE UNDERWRITER AS YOU HAVE ALWAYS DONE.**

It may help to think of the Closing Disclosure as a DISCLOSURE document, not a DISBURSEMENT document. The surcharge is being disclosed as a governmental assessment. But it is disbursed to the underwriter, who then pays the surcharges it has collected to the State. Since the surcharge is not a component of title insurance, it should never be preceded by "Title - ."

NOTE: Lenders may have a different interpretation. Lender instructions should normally be followed since they are responsible for the content of the Closing Disclosure. We believe that if the lender asks for your assistance or advice, separately itemized in Section E would be the preferred placement.

T15. If a lender on a commercial transaction requires a mortgage on one of the parties' residences, does that mortgage fall under the provisions and requirements of TRID?

A. As long as the "primary" purpose of the mortgage on the residential property is NOT for "personal, family or household purposes," it does not fall under the provisions of TRID.

T16. Do the provisions of the Rule apply to second mortgages?

A. There is no exception for a mortgage merely because of its priority. Such a mortgage may, however, qualify for an exemption for other reasons. For example, a Home Equity Line of Credit (HELOC), which is often secured by a second mortgage, is not covered since it is an "open-end credit" transaction. It would not be covered even if it was a first mortgage since the TRID Rule only governs "closed-end credit" transactions. ("*Closed-end credit* means consumer credit other than 'open-end credit'" 12 CFR 1026.2(a)(10))

T17. When a transaction has two simultaneous mortgages are one or two Closing Disclosures used?

A. When conducting a transaction with two simultaneous mortgages, the primary lender will make the decision as to whether there will be one Closing Disclosure (CD) or two. If the second loan is exempt (e.g. HELOC; downpayment assistance loan), a separate settlement statement might be used since a CD would not be required. (The Rule only discusses the disclosure and placement of the proceeds from the subordinate loan on the primary loan's CD when two settlement statements are being utilized and leaves open the possibility that all costs would be shown on one.) If the lender chooses to show both the primary and subordinate loan on one CD, the lender will determine how to disclose the costs associated with the subordinate loan.

T18. May lenders charge application fees or fees for pre-approvals?

A. The lender may not charge anything at the time of loan application except a reasonable fee to pay for a credit report. After delivery of the Loan Estimate **and** after the consumer gives an indication that he/she wants to proceed with the loan, the lender may charge additional fees and require the additional information needed to underwrite the loan.

T19. What are the six elements that trigger a loan application has been received and then requires the lender issue the Loan Estimate within three business days?

A. You can easily remember the six elements by its acronym = A.L.I.E.N.S. (See 12 CFR § 1026.2(a)(3)(ii))

Address of Property
Loan Amount Sought
Income of Borrower
Estimated Value of Property
Name of Borrower
Social Security Number

T20. Who prepares the borrower's Closing Disclosure (CD) form?

A. The Rule grants the creditor the option of preparing the CD or sharing that responsibility with the settlement agent. TRID Comment 19(f)(1)(v)-3 states: "If a settlement agent provides disclosures...in the creditor's place, the creditor remains responsible…for ensuring that the requirements of [12 CFR] § 1026.19(f) have been satisfied."

T21. How much of a change to the APR is allowable without triggering a new three-day review period?

A. Depending on the type of loan it is either 1/4 or 1/8 of a percent. Some lenders will err on the side of caution and use the 1/8 of a percent change on all loans no matter what loan product is used in the transaction.

In unofficial guidance, CFPB Director Richard Cordray has stated that the CFPB will only be concerned about changes that *increase* the APR by the stated limits. Despite this guidance, lenders may remain cautious and require a new three-day review period for decreases in APR as well.

T22. I thought that the whole process was that NOTHING changed after the delivery of the Closing Disclosure.

A. You are thinking of the original proposal by the CFPB in the draft of the Rule. Because of the American Land Title Association's massive effort (along with the help of a number of our related industry professionals) to convince the CFPB that delaying closing for minor changes would cause chaos and harm both buyer and seller, the final Rule states that under only three circumstances will the three-day review period be re-triggered. The three instances where a new review period is required are:

1) If the annual percentage rate (APR) becomes inaccurate,
2) If the loan product is changed, or
3) If a pre-payment penalty is added.

Know also that other last minute changes may cause a lender to have to re-submit the file for additional underwriter review or for a new appraisal. This too would delay a closing though it would not be related to any TRID-Rule violation.

T23. If the closing is a "mail away" we usually need the package ready several days before closing. Does the three-day time period also apply to the closing documents from the lender or is it just the Closing Disclosure?

A. The CD is the disclosure document required to be delivered prior to closing, not the entire closing package. Therefore you are going to have to do what you have always done: stay in close communication with the lender in order to get everything you need when you need it.

T24. How do I handle the situation if the consumer states that they never received the Closing Disclosure?

A. Simply call the lender and tell them the consumer states that they did not receive the CD in advance and then inquire if the lender would like you to proceed. Remember, if the lender used the "mail-box method" of delivery (either mailing or emailing the CD seven days in advance), there is a presumption in the Rule that the consumer received the CD without requiring proof of receipt. Therefore, it is entirely possible that the lender met its obligation but the CD got lost in the mail/email. "Receipt" then is defined by the Rule and does not necessarily mean that the consumer actually received the CD!

T25. If a consumer writes a statement specifically waiving their right to the three-day review is there a provision to allow for this?

A. The rule is quite clear on this so here it is:

Consumer's waiver of waiting period before consummation. If the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency, the consumer may modify or waive the three-business-day waiting period… after receiving the (Closing Disclosure). To modify or waive the waiting period, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all consumers who are primarily liable on the legal obligation. Printed forms for this purpose are prohibited. See 12 CFR 1026.19(f)(10)(iv).

It is important to remember that the definition of "consumer" under the Rule is limited to the borrower, as a consumer of credit. The seller is not considered a consumer under the Rule.

As a practical matter, lenders are unlikely to accept a waiver for a variety of reasons including instructions from the investor lined up to purchase the loan from the lender.

T26. Do the regulations in the Rule affect the three-day right of rescission on refinances or do the borrowers get three days prior to signing plus three days after?

A. The three-day right of rescission for covered refinance transactions does not change with the new Rule. Therefore the consumer will have three business days prior to consummation to review the fees, terms and charges and at least three business days after consummation to exercise their right to rescind.

T27. When a transaction closes late in a calendar year, the lender often requires the full payment of the current year's property tax bill. Where should that payment be disclosed on the Closing Disclosure (CD)?

A. Since an October closing usually means the first loan payment will be due on December 1, lenders often want the settlement agent to collect for and make payment of the current year's tax bill when it becomes available in November. (Lenders may also insist upon similar withholdings and payments for closings in other months due to the logistics of setting up and administering the borrower's escrow account for future payments.) Here are some examples of how lenders may allow these payments to be disclosed:

"Section F. Prepaids" is reserved for items the lender requires to be paid in advance of the first loan payment. Payment of the tax bill in November in advance of the first loan payment due in December satisfies that condition. If shown in Section F. Prepaids, the payment would likely be disclosed in the borrower's column, but it could be directed to the seller's column as well. In either case, the proration on page three in the Summaries of Transactions tables will apportion the obligation between the parties.

"Section H. Other" is intended to capture optional items as well as those services which the lender does not require as a condition of closing the loan. Since arguably the payment of a tax bill before its due date is not a condition for closing the loan, some lenders may decide that this is the appropriate location.

"Section N. Due from Seller at Closing" is intended, among other things, to capture the payoff of liened items such as the seller's existing mortgage. Although some may discount the disclosure here of a not yet due tax bill, they do so on the theory that no lien has been recorded. Since, in Florida, the lien attaches automatically on January 1st of the tax year without the necessity of a recording, we feel this solution addresses the Florida situation accurately and that Section N is a viable alternative.

T28. Where will we show payments to construction subcontractors on the Closing Disclosure? What if there aren't enough lines?

A. That depends on the form used by the lender. When construction is financed, there often is no seller. That opens up the possibility that the lender will require the use of the CD form H-25(J) which can be used when there is no seller. On that form, page three has a Payoffs and Payments table where these payments can be itemized. If the number exceeds 15, the final line can be used in connection with an addendum which would include additional payments.

Since the lender may not necessarily use the alternative form, the payments can be disclosed on the standard form H-25(A) in Section K. Due from Borrower at Closing as Adjustments. Since there are so few lines, the bottom line can contain the total of all additional payments disclosed on an addendum.

T29. Where are the buyer's and seller's signature lines on the Closing Disclosure?

A. Like RESPA and the HUD-1, there is no requirement that either party acknowledges the truthfulness of the form or authorizes disbursements. (However, the Rule provides an option for the lender to include a Confirm Receipt signature for the borrowers.) Our Florida Insurance Premium Disclosure rule requires such an acknowledgement and authority and the required language confirms the parties review and agreement with the CD and any other settlement statements used by the settlement agent. In the event you need a signature page for your CD forms, you may use an addendum to add them. (In DoubleTime®, "Addendum B - Customary Recitals", which includes the same certifications as found in the Florida rule, will satisfy that need.) Finally, the optional use of an ALTA Settlement Statement will also provide you with the ability to have the parties sign and the same certifications mentioned above will be found there as well.

T30. What are the procedures when something changes after closing?

A. If a fee to the consumer becomes inaccurate within 30 days of consummation and that inaccuracy results in a change to the amount actually paid by the consumer, the Creditor must deliver or place in the mail a revised Closing Disclosure (CD) within 30 days of knowledge of the inaccuracy.

If a clerical non-numeric error is discovered, the Creditor must deliver or place in the mail a revised CD within 60 days after consummation.

If a tolerance level is violated, the Creditor must refund the required amount to the consumer within 60 days of consummation and the Creditor must provide a revised CD reflecting the refund within the same 60 day time period.

T31. Where can I read the new regulations?

The regulations related to TRID are codified in 12 CFR Part 1026 - Truth in Lending (Regulation Z). The CFPB has a link at http://www.consumerfinance.gov/eregulations/1026-1/2015-18239#1026-1 Another site which many have found useful is https://www.bankersonline.com/regulations/12-1026-000

In particular, the following sections are particularly useful in understanding forms completion:
12 CFR 1026.37 - Content of disclosures for certain mortgage transactions (Loan Estimate)
12 CFR 1026.38 - Content of disclosures for certain mortgage transactions (Closing Disclosure)
Other sections which contain significant guidance are the following:
12 CFR 1026.2 - Definitions and rules of construction
12 CFR 1026.3 - Exempt transactions
12 CFR 1026.17 - General disclosure requirements
12 CFR 1026.19 - Certain mortgage and variable rate transactions
12 CFR 1026 Appendix D - Multiple Advance Construction Loans
12 CFR 1026 Appendix H - Closed-End Model Forms and Clauses

T32. Do I have to provide a Closing Disclosure form to the seller? (Why can't I just give them a HUD-1, ALTA Settlement Statement, or some other "easy" form?)

TRID requires settlement agents to provide "the disclosures in 12 CFR § 1026.38 that relate to the seller's transaction reflecting the actual terms of the seller's transaction" (12 CFR § 1026.19(f)(4)(i)). "The settlement agent complies…by providing a copy of the Closing Disclosure provided to the consumer, if it also contains the information under § 1026.38 relating to the seller's transaction, or alternatively providing the disclosures under § 1026.38(t)(5)(v) or (vi), as applicable." (Comment 19(f)(4)(i)-1.)

Providing a HUD-1, ALTA Settlement Statement, or some other "easy" form does not satisfy these TRID requirements. The easiest way to comply is to complete and provide promulgated Form H-25(I) *Mortgage Loan Transaction Closing Disclosure - Modification to Closing Disclosure for Disclosure Provided to Seller - Model Form.* In the alternative, you have two other options pursuant to the rules outlined above. With the lender's permission, you can provide the seller with the same form provided to the borrower as long as it includes all the seller information including the specific charges for services and products for which the seller is responsible. Or you can provide a modified or redacted version of the same form after removing all information related to the borrower and lender by following the guidance provided by § 1026.38(t)(v).

T33. Must private lenders provide borrowers with loan estimates and closing disclosures?

Private lenders are exempt if the private lender does not meet the definition of "creditor" under 12 CFR § 1026.2(a)(17). Generally speaking that depends upon whether the private lender "regularly extends consumer credit" (*See,* 12 CFR § 1026.2(a)(17)(i)and(v)).

A person "regularly extends consumer credit" if they extended credit more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year* or if, in any 12-month period, they originate more than one "high-cost" HOEPA loan that falls under the provisions of 12 CFR § 1026.32, or one or more such credit extensions through a mortgage broker.

*If the numerical standards are not met in the preceding year, they apply to the current year.

CAVEAT: It should be noted that even private lenders who do not meet the definition of "creditor" are subject to the Loan Originator Compensation Rule, which does not require a Closing Disclosure, but has its own set of prohibitions and requirements. (Seller financers who finance no more than one or no more than three properties in any 12-month period may qualify for exclusion from this rule depending on the specifics of the transaction.) (*See,* 12 CFR § 1026.36)

Closing Disclosure Functionality

C1. Is there going to be a special "worksheet" to calculate the credit to the Buyer for the title fees in a contract where the seller pays for the owners' policy?

A. In DoubleTime the rating calculator will produce a worksheet which reflects Florida rates. The Florida charges will automatically convert to TRID rates for display in the Closing Costs tables on the CD. DoubleTime will also populate a Florida Insurance Premium Disclosure you can use to compare Florida rating to TRID rating.

With that document you can subtract the Florida rate for the loan policy (which includes any endorsements) from the TRID rate for the same and the difference will be the adjustment amount for which the seller is responsible.

C2. If there are miscellaneous affidavits needed to clear the title, are they included in Line 01 (Recording Fees)? Does it matter if they are the seller's responsibility?

A. Yes, all per-page recording fees will be totaled and entered in the respective columns on a single line: Line 01 (Recording Fees), even those which are the responsibility of the seller.

Any costs payable by the borrower for recording additional documents will be added to the itemized charges for recording the deed and mortgage and the total will be disclosed in the borrower's column. Similarly, costs payable by the seller for recordings will be disclosed as a total in the seller's column on the same line and will not be separately described.

If you wish, you may show a complete itemization of recorded documents on an additional page as a "customary recital." In DoubleTime®, the Recording Worksheet found under the Reports Tab serves that purpose.

C3. Do e-recording fees paid to a third party get lumped in with all other recording fees on Line 01 (Recording Fees) of Section E (Taxes and Other Government Fees)?

A. Since Section E is reserved for payments to state and local governments it is unlikely that lenders will disclose these fees in that section since they are not paid to government. Instead, the proper location will likely depend on whether the lender authorizes or requires the use of e-recording services.

If required, they should be disclosed within the same table as the lender's title insurance premium. If authorized, but not required, they should be considered an elective service which would be disclosed within the table H. (Other).

Note also that under an interpretation of Florida law e-recording fees are arguably a component of the settlement fee when the use of such a service is not required by a lender.

C4. What if there is an error in disclosing closing costs? For example, what if a seller is charged for documentary stamps but it should be buyer's expense? Does the three-day period restart?

A. Changes to the amount of documentary stamps or the party paying the stamps are not changes which require a new three-day waiting period. They will necessitate a revision and re-distribution of the Closing Disclosure so inform the lender of the correction as soon as possible.

C5. Does a change to closing costs or change in cash to close require a revision to the Closing Disclosure to restart the three-day period?

A. Changes to closing costs or cash to close will require a revision to the Closing Disclosure, but will not automatically require a restart of the three-day delivery clock.

If the change is accompanied by either an increase in the APR above the legal limit, a change in the loan product, or the addition of a prepayment penalty, it is that change which will cause a restart of the clock.

C6. In certain circumstances, a charge attributable to Buyer may become apparent after CD has been delivered (i.e. HOA fee attributable to the Buyer). How will the lender learn of this and will such a change require a new three-day waiting period?

A. A change in an HOA fee alone will not require a new three-day waiting period. A new three-day wait is only required when one of the following occurs:

- Change in the Annual Percentage Rate (APR) as calculated by the lender
- Change in the loan product offered to the consumer
- Addition of a prepayment penalty to the loan product.

The lender will learn of changes when the settlement agent provides this updated information using the means of communication recognized by the lender. Many lenders are indicating they will use third-party cloud-based software such as Closing Insight to communicate with settlement agents.

C7. Will the Lender answer shop or not shop questions or is closing agent to determine these issues?

A. The lender will answer the shop or not shop questions. The lender is responsible for the Closing Disclosure and will determine the placement on the form of your fees and charges.

C8. How do we calculate Down Payment/Funds from Borrower in the Calculating Cash to Close table on page 3 of the Closing Disclosure?

A. The Down Payment/Funds from Borrower line serves two distinct purposes. Down Payment is related to a purchase transaction while Funds from Borrower is used for all other transactions.

For purchase transactions, Down Payment simply represents the difference between the purchase price and the principal amount of the loan governed by this Closing Disclosure.

When there is no seller involved, Funds from Borrower represents the amount, if any, the consumer must bring to closing to complete this loan transaction. The software will calculate this sum for you.

C9. What happens if at the walk-through (closing date or the day before), the seller agrees to give a credit to buyer?

A. This depends on the reason for the credit. If the credit does not affect the potential value of the property, the change would fall into the same category as other changes which require a new version of the Closing Disclosure, but not a new three-day waiting period.

The credit will normally be disclosed within the borrower and seller Summaries of Transactions tables. If, however, it is a specific credit for a service itemized in one of the Closing Costs tables on page two, the credit will instead be reflected on that line.

If the credit is being given because a repair has not been made or the seller is removing fixtures or personal property the parties had previously agreed would stay, this may affect the appraised value of the property. Under other rules affecting appraisals, as well as the lender's internal underwriting guidelines regarding appraised values and loan amounts, the need for a new Closing Disclosure and three-day waiting period is likely in this scenario.

Lenders are advising real estate agents to have walk-through inspections performed earlier than the day of closing. It is also important that sellers be informed of the potential delay in closing date if contracted repairs are not performed or appliances or other items are removed from the premises. Communication between all parties and their real estate agents is extremely important.

C10. What if we don't want our FL license ID number disclosed under contact information on the Closing Disclosure?

A. The Closing Disclosure forms require contact information for the entity as well as an individual within the company. Failure to disclose relevant information could be considered a rules violation subjecting the lender to a significant penalty. If you choose not to disclose this number, the lender may refuse to do business with you and your firm.

If you are concerned about the privacy of your information, you should know that the requested license ID is a matter of public record. It is NOT your social security number.

C11. What identification number should be used for the individual in the contact information table?

A. On the "Contact ___ License ID" line the license number, or other unique identifier, of the natural person who interacts most frequently with the consumer is disclosed.

In the event that person does not have either number, the number of the most immediate supervisor who has such a number will be disclosed. The rule is more concerned that a number be disclosed even if that is not the employee who interacts most frequently with the consumer!

Attorneys and Florida Registered Paralegals will disclose a Florida Bar license number; Certified Paralegals will disclose a NALA account number; and licensed title agents who are not attorneys will disclose a Florida Department of Financial Services license number. (Note: lenders may have a more restricted view of rule interpretation and not allow use of Florida Certified Paralegal or NALA account numbers. This is because the commentary to the rule found at 38(r)-6 says not to use the name of an individual who is "only performing clerical functions.")

C12. What identification number should be used for the entity in the contact information table?

A. On the "__License ID" line the license number or unique identifier associated with the legal or trade name of the individual or company employing the natural person who interacts with the consumer is disclosed.

In the case of an entity, that will be the number assigned by the regulatory body in charge of registering the business activity, such as the Florida Department of State. If the entity is not registered, the field will be left blank. If a sole practitioner, the Florida Bar license number will be disclosed. In some situations, the attorney could be both the entity and individual contact for disclosure purposes if no employee has either a license or other unique identifying number for purposes of the form.

C13. What should we be using as a disbursement sheet?

A. The Closing Disclosure form is difficult to use as a disbursement document for a variety of reasons. DoubleTime® will continue to seamlessly produce a "Balance Sheet" report to provide that solution for you. You might also rely upon a separate settlement statement for the participants and

use it as a disbursement document. If you do so you must be prepared to provide a copy to the lender.

C14. Can we put signature lines on a separate page if needed?

A. Just like the HUD-1, the rules do not require signatures other than when the Confirm Receipt disclosure is included. The lender will direct you if they want signatures on the Closing Disclosure.

You may also choose to have the parties sign your own settlement statement for your file. If you do, the lender will likely want a copy.

C15. Why aren't there any tables on the bottom of my borrower's Closing Disclosure page four?

A. The AIR and AP tables which may appear at the bottom of page four may only appear when they contain information. They will be displayed if the loan has an adjustable payment feature (AP) and an adjustable interest rate feature (AIR). If only one feature, then only one table will appear. In your case your client's loan is likely a fixed rate product. Fixed rate products generally do not include adjustable payment or adjustable interest rate features. Under those circumstances, no tables are allowed to appear in blank under TRID rules.

C16. Where should I disclose the Florida policy surcharge (currently $3.28) on the Closing Disclosure?

A. The policy surcharge required by Sec. 627.7865, F.S. is described in Sec. 631.401(2), F.S. as a "governmental assessment." As such it should be disclosed in Section E. Taxes and Other Government Fees. There is no hard and fast rule as to how it should be described on the CD, but it must include the reference "State of Florida" as the payee following the word "to" on that line.

Since it is not a component of title insurance, it should never be preceded by "Title -".

NOTE: *We know that others have a different interpretation and that Sections B, C and H have also been suggested. The reason for the disagreement is based upon the conflict between the Loan Estimate rule (§ 1026.37(g)(1)(i)) and the Closing Disclosure rule (§ 1026.38(g)(1)(i) and (ii)) We believe that if the lender asks for your assistance or advice, separately itemized in Section E would be the preferred placement.*

C17. How do I charge and collect eRecording fees?

A. Most eRecording fees are considered to be a component of "closing services" as defined by Sec. 627.7711(1)(a), F.S. and must be included in the settlement/closing fee. As such, they may not be separately itemized. (You may, however, choose to itemize costs and services which are included in your settlement/closing fee on a separate disclosure.)

NOTE: *Lender instructions may specifically direct itemization. If that is the case, you should follow the lender instructions.*

C18. How are charges for municipal lien searches (and similar searches) shown on the closing statement or Closing Disclosure?

A. Current interpretation is that a lien search is considered part of the "title search" as defined by Sec. 627.7711(4), F.S. and that it may be included in the charge for the title search. (A search of the records of a Uniform Commercial Code filing office is the only title search specifically excluded from such treatment.)

Based upon unofficial guidance from the State of Florida, as well as the practical problems faced by lenders in creating Loan Estimates, best practice would suggest that you combine all of your title search fees into one entry on the CD such as "Title - Title Search to "Name of Settlement Agent"." When done in this fashion you would issue separate checks for all services included within the combined amount.

In the event you are authorized or directed to itemize a lien search separately from other title search charges, you should disclose it as "Title - Title Search to Lien Search Company."

For closings where a CD is not issued (e.g. cash, commercial, etc.) you may choose to either combine your title searches into one fee or to separate them. In either case, the fee should be called "Title Search." If you choose to combine the fees, the payee should be the settlement agent who handled ordering the searches. If the fees will be displayed separately you would list the payee as the entity to whom the bill is owed. For example, two fees would be displayed as:

Title Search Fee to ATFS, LLC - $150
Title Search Fee to Lien Search, Inc. - $250

Whereas a combined fee would be displayed as:

Title Search Fee to Adam Attorney, P.A. - $400

C19. Am I permitted to separately itemize and disclose Closing Insight® transaction fees on the CD?

A. Until we get more experience with how lenders are handling Closing Insight and other portal fees, these fees should be separately itemized when initial numbers are given to the lender.

C20. How do I give a "Butler Rebate"?

A. The Butler Rebate is a rebate of all or a portion of a title agent's share of title insurance premiums. It can only be given to the party charged for the title insurance premium upon which the rebate is based.

The disclosure of unadjusted title insurance premiums is made on page two of the Closing Disclosure in the Loan Costs and Other Costs sections. These disclosures must be calculated using Florida promulgated rates but disclosed in the manner prescribed by TRID.

A Butler Rebate of an agent's share will be separately disclosed on page three in the Summaries of Transactions tables. Rebates to borrowers will be disclosed on an available blank line in Section L (Paid Already by or on Behalf of Borrower at Closing) under "Other Credits" ("Butler rebate from named title agent/agency $____). Rebates to sellers will be similarly disclosed on a blank line in Section M (Due to Seller at Closing) above "Adjustments for Items Paid by Seller in Advance."

C21. How do I show a reissue credit?

A. The reissue credit is not a true credit; rather it is a less expensive promulgated rate which is applied to new policies when a qualifying prior policy has been provided (See Rule 69O-186.003, F.A.C.). Therefore, the premiums disclosed on the CD will already reflect the "reissue credit" though it will not be separately stated.

You are free to inform the client about the savings from the application of the reissue rate by showing the savings on a separate addendum or printout.

C22. Can I itemize association estoppel fees?

A. Yes. Information provided by an association does not come from "official or public records" so obtaining this information is not considered to be a title search.

C23. Which line and what number do I put in the Contact Information table for real estate agents?

A. You will need both the license number of the agent and the license number of the agent's real estate broker to complete the Contact Information table. The broker's state-issued license number will go on the first "FL License ID" line and the agent's license number will go on the second "FL License ID" line. You can search the Florida Department of Business & Professional Regulation website for license information at https://www.myfloridalicense.com/wl11.asp

C24. Why is the Owner's policy listed in the "Other" Section (Section H)?

A. Unlike the HUD-1 where settlement services were grouped together, the location of the individual services and products on the Closing Disclosure are primarily based upon whether the services are required to complete the loan transaction. Those connected to the loan are further categorized based upon who is providing the service and sometimes by the ability of the borrower to shop for a required service. Those not required to complete the loan transaction, like the Owner's policy, are grouped together in Section H even though they may be required by the purchase and sale contract (e.g. real estate agent commissions; home warranty; seller-paid owner policy), are optional products or services chosen by the borrower (e.g. inspections; buyer-paid owner policy), or otherwise identified by TRID (e.g. association fees and charges).

C25. How is title insurance premium calculated and disclosed on the Closing Disclosure?

A. The premiums for owner policies, loan policies, and endorsements, continue to be calculated using Florida's promulgated rate structure. (This includes use of the discounted rates for

simultaneous issue, substitution loan, new home purchase and reissue.) The display of premium on the Closing Disclosure in a purchase transaction are effected by making a calculation for a stand-alone loan policy, including endorsements, and a separate calculation of the cost of the purchase of both policies including endorsements. The difference between the two sums is the "incremental increase" attributed to the purchase of both policies.

The cost of a loan policy, and its endorsements, is disclosed on the Closing Disclosure as if there were no owner policy to be given (i.e. stand-alone loan policy). The reason TRID uses this method is based upon the premise that a borrower needs to know the cost of the policy required by a lender should the borrower choose not to purchase an owner's policy. (This ignores a common scenario where the purchase of the owner's policy is, by contract, being paid for by someone else, usually the seller.) The cost for the purchase of an owner's policy is disclosed as the incremental increase attributed to the purchase of an owner's policy when both policies are purchased.

The official commentary to the rule explains these procedures at http://www.consumerfinance.gov/eregulations/1026-Subpart-E-Interp/2015-18239#1026-38-g-4-Interp-1 and at http://www.consumerfinance.gov/eregulations/1026-Subpart-E-Interp/2015-18239#1026-37-g-4-Interp-2

Florida Rules

F1. Have the FR/Bar and FAR contracts been amended to address these new rules?

A. Yes, both have been revised. The new versions are the FloridaRealtors/FloridaBar- 4 Rev. 9/15 and the CRSP-14 Rev. 9/15.

F2. Why did the Florida Department of Financial Services adopt this new rule?

A. As reflected in the Notice of Rulemaking Development, it was needed to correct the "inadequate and potentially misleading information regarding the cost of title insurance" and to reverse "the unintended consequence of relieving the settlement agent from closing process liability, even though the settlement agent continues to handle the disbursement of escrow funds."

F3. Where can I get a copy of the new DFS-H1-2146 form?

A. There are PDF and Word formatted versions on the Fund's website.

Pdf - Florida Title Insurance Premium Agent

Word - Florida Title Insurance Premium Agent

F4. What do I do with the form once it is completed?

A. A completed and signed copy must be provided to the buyer, seller and lender named in the transaction; and maintained in the title insurance agency file for at least five years. (Rule 69B-186.008(8), F.A.C.)

F5. How do I complete the Settlement Agent Certification box?

A. The settlement agent name is shown as either the attorney issuing the title insurance, the title agent issuing the title insurance, or the designee of either who is performing the closing. The "Florida License Number" line to the right of the settlement agent name can be left blank unless it is being signed by the DFS-licensed title insurance agent in which case the DFS-assigned license number for that agent shall be entered. In the case of an attorney or designee of either, no number is required.

The "Title Agency Holding Funds" field is completed with the name of the DFS-licensed title insurance agency issuing the title insurance policy and/or holding and disbursing escrow funds. In the event an attorney or law firm is issuing the policy and/or holding and disbursing trust account funds, The Fund best practice is to enter the name of the attorney or law firm on this line.

The "Florida License Number" line to the right of the title agency name is completed with the entry of the DFS assigned license number of the title agency. A Fund best practice is to enter the Florida Bar assigned license number of the attorney, but if a law firm is described then no number need be entered.

DoubleTime® will do this automatically once the settlement agent information has been completed for the transaction.

F6. How do I complete the table on the form?

A. The two columns on the left side of the table reflect the premium charges for the policies and endorsements, the distribution of the costs for those premiums between buyer and seller, and the subtotals and totals for each. The premium and endorsement charges come directly from page two of the Closing Disclosure form while you are responsible for calculating totals.

The two columns on the right side of the table reflect premium charges for the same policies and endorsements, the distribution, and totals. Here, however, the charges are based upon Florida's promulgated rates and these charges will come from your Rate Sheet or other resource you use to calculate Florida rates.

On the bottom line (Total All Policies (c + f)) a total which combines all buyer and seller costs is entered in the Closing Disclosure Amount side and similarly a total is entered on the Florida Premium side. These totals should be the same.

DoubleTime® will do this automatically as long as you complete the information on the Closing Disclosure before you access this form in the Documents module.

F7. Can I edit the form?

A. Yes, but carefully. The rule has very specific requirements and the form "meets all the requirements necessary to comply" (Rule 69B-186.008(9), F.A.C.). Tinkering with it might expose one unnecessarily to the risk of non-compliance.

F8. Are attorneys who do not issue title insurance through a title insurance agency required to follow the rule?

A. The rule is promulgated by the Department of Financial Services which does not have enforcement jurisdiction over licensed attorneys. However, The Fund feels that it is a best practice for attorneys to comply. We believe our members should strive to meet or exceed all the requirements imposed upon licensed title insurance agents.

F9. When must I use the new form?

A. You are never required to use the DFS-H1-2146 form. You are, however, required to comply with Rule 69B-186.008, F.A.C. Escrow Disbursements which went into effect on Oct. 28, 2015. The rule requires the comparison of inaccurate title insurance rates found on the CFPB's Closing Disclosure form with the actual promulgated rates required in Florida. The rule also requires the use of specific language and signatures for buyers, sellers and settlement agents in all transactions where title insurance will be issued. Use of this form assures compliance with the rule! It provides a "safe harbor"!

When using the form for cash, commercial real estate, and other transactions which do not involve the CFPB's Closing Disclosure, the table on the form may be left blank or crossed out.

F10. When issuing owner's and loan policies, what premium amount should we show on Schedule A for each policy?

A. The policies should reflect the correct premiums per Florida Law, not the distorted TRID rating shown on the Closing Disclosure.

F11. Why am I being asked to provide a preliminary HUD before a loan has been approved? Should I provide one?

A. Lenders are trying to gather information in order to deliver a Loan Estimate within three days after receipt of a loan application; many do not yet know how to gather the information they need so they are sticking with what they know and who they know - you and the good ole HUD-1 settlement statement! You should resist providing your information on that form because it will give the lender incorrect information about the title insurance premiums and you might get blamed.

Under appropriate circumstances (e.g. you have the contract and will be providing the settlement services), you should strive to provide your standard fees and title insurance premium information on a pro forma Closing Disclosure. This should not be difficult if you are in receipt of the contract and have opened and populated a DoubleTime® file with basic information. (You need not go to any

great effort to capture third-party information, but you should make lenders aware of any requirements you might anticipate.)

Lenders will need title insurance premium breakdowns using the new TRID formula; your settlement fee (don't forget to include the miscellaneous charges that you may have itemized in the past); and your title search charges (including municipal lien search, if you need one). Include an entry for "Title - Survey" if required for a Form 9 endorsement even if you do not know who will do the work or how much they will charge; lenders will have to come up with that estimate on their own. If your contract includes an association disclosure, let the lender know the amount stated on the disclosure for regular assessments.

If you have not begun to create a file, you may decide to provide a rudimentary "fee sheet." The goal is to provide enough information about your fees with the least amount of effort since you may not get the deal. Knowing the sales price and loan amount will allow you to provide the "TRID rates" for the policies and endorsements. If you will need a survey for a Form 9 endorsement, let the lender know that it will need to get an estimate since the survey will be required. Any more information than that will depend upon your knowledge of the transaction and your comfort level. Be prepared to be held to any estimates you provide so proceed with caution.

F12. Where do I put the $3.28 surtax on form DFS-H1-2146?

A. The surtax is not considered to be part of the premium and is not required to be disclosed on that form.

F13. Where should I send the $3.28 surcharge?

The surcharge should continue to be made payable to Old Republic National Title Insurance Company and mailed to The Fund at this address:
Attorneys' Title Fund Services, LLC
P.O. Box 628601
Orlando, FL 32862-8601

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FUND ASSEMBLY 2016

MANAGING CONSTRUCTION LIEN RISK

COMMERCIAL REAL ESTATE TRACK

Manuel "Manny" Farach, Member at McGlinchey Stafford
in Fort Lauderdale

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SPEAKER INFORMATION

MANAGING CONSTRUCTION LIEN RISK

Manuel“Manny” Farach
Member at McGlinchey Stafford in Fort Lauderdale

Manuel Farach, a Member at McGlinchey Stafford in Fort Lauderdale, is board-certified by The Florida Bar in Real Estate Law and Business Litigation, and represents clients in both transactional and litigation matters. Mr. Farach has three decades of experience, including as outside general counsel for a savings and loan association, and is the author of *Florida Real Estate Law*, the real estate component of *West’s Florida Practice Series*.

Mr. Farach serves as Chair of the Florida Supreme Court Committee on Standard Jury Instructions for Contract Cases. In addition to his numerous speaking engagements, Mr. Farach has served as an Adjunct Professor of Real Estate Law at The Florida State University College of Law, and as an Adjunct Professor of Business Law at the Rinker School of Business at Palm Beach Atlantic University.

He serves on the Executive Councils of the Real Property, Business Law and ADR Sections of the Florida Bar. He is listed in The Best Lawyers in America®, Florida Trend’s Legal Elite, and Florida Super Lawyers, and has received an AV Peer Review Rating from Martindale-Hubbell.

Mr. Farach publishes the Case Law Update, a weekly summary of Florida real estate and business cases. McGlinchey Stafford is a national law firm with 200 attorneys located in 13 offices in 8 states and the District of Columbia, and has received national recognition for its real estate, financial institution, and business representation.

Managing Construction Lien Risk

Manuel Farach, Esq.
McGlinchey Stafford

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Manuel Farach, a Member at McGlinchey Stafford in Fort Lauderdale, is board-certified by The Florida Bar in Real Estate Law and Business Litigation, and practices both transactional and litigation law. He is the author of Florida Real Estate Law, the real estate component of West's Florida Practice Series, and serves as Chair of the Florida Supreme Court Committee on Standard Jury Instructions for Contract Cases. In addition to his numerous speaking engagements, Mr. Farach has served as an Adjunct Professor Real Estate Law at The Florida State University College of Law and of Business Law at the Rinker School of Business at Palm Beach Atlantic University. He serves on the Executive Councils of the Real Property, Business Law and ADR Sections of the Florida Bar. He is listed in The Best Lawyers in America®, Florida Trend's Legal Elite, and Florida Super Lawyers, and has received an AV Peer Review Rating from Martindale-Hubbell. Mr. Farach publishes the Case Law Update, a weekly summary of the past week's real estate and business cases.

Preface

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There can be no more confusing statute in Florida than the one on liens under Chapter 713. The frequent impracticality of its application in the field, coupled with ill conceived, confusing, patchwork amendments, all topped off by conflicting appellate decisions, have all combined to make life miserable for judges, lawyers, legislators and the vitally affected construction and lending industries.

American Fire & Cas. Co. v. Davis Water and Waste Industries, Inc., 358 So. 2d 225, 225 (Fla. 4th DCA 1978) (Letts, J.)

PPT

- Property,
- Party, and
- Time

I. Refresher Course on Construction Liens

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Persons Entitled to Lien

1. Contractors,
2. Design Professionals (architects, landscape architects, interior designers, surveyors, mappers, engineers),
3. Subcontractors,
4. Laborers,
5. Suppliers,
6. Sub-subcontractors, and
7. Assignees.

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Persons **NOT** Entitled to Lien

1. Supplier to a supplier,
2. Sub-sub-subcontractor,
3. Unlicensed contractors,
4. Supplier to "shelf" (not project),
5. Fabricator to supplier,
6. Government property work, and
7. Work not "improve" the property.

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Notice of Commencement

- Required on all job sites
- Good for one year
- Not "proper payment" if expired
- Lienors entitled to rely on information
- Extended/amended during its life

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Direct Contracts on Residential Projects

- Applies $2,500 or greater
- Must have F.S. 713.015 warning
- But does not effect lienors who don't have direct contract with owners

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Notice to Owner

- Not required subdivision improvements
- Not required direct contracts with owner
- Notice must "substantially comply" with F.S. 713.06(2)(c)
- Timely if served:
- a. Before commencing work
- b. within 45 days after commencing (but before Final Affidavit served)

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Claim of Lien

- "Substantially" follow F.S. 713.08
- Owner's property
- Copy served 15 days after recording
- Must be recorded
  - during the work,
  - no later than 90 days after finish

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Filing Suit

- One year from Claim of Lien filing date
- 20 days from show cause order
- Contractor's Final Affidavit must have been served prior to filing suit

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Discharge and Termination

- File suit one year from date of recording
- Can be bonded off
- Cannot be filed on public property
- Can be discharged by court order

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II. Recent Case Law

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Jax Utilities Management, Inc. v. Hancock Bank, 164 So. 3d 1266 (Fla. 1st DCA 2015).

- Statute governing responsibilities of construction loan lenders precluded contractor's common law equitable claims.

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Andre Franklin, Inc. v. Wax, 150 So.3d 815 (Fla. 2d DCA 2014)

- Contractor did not waive its contractual right to arbitration by filing a counterclaim simultaneously with its motion to compel arbitration, motion to dismiss, and motion to abate.

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Barber v. Dahlia at Plantation Homeowners Ass'n, Inc., 101 So. 3d 899 (Fla. 4th DCA 2012)

- A factual dispute as to whether lienor was a "laborer" who was exempt from notice requirement precluded summary judgment

Bayview Const. Corp. v. Jomar Properties, LLC, 97 So. 3d 909 (Fla. 4th DCA 2012)

- Although reduction of transfer bond cause material harm to contractor, trial court properly reduced bond under the circumstances.

III. Strategies for Dealing With Liens

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Pre-Dispute Tactics

- Request Sworn Statements of Account
- Pay lienors only when provide proper Waivers/Releases of Lien

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Proper Lien? (PPT)

- Party Entitled to Lien?
- Property Subject to Lien?
- Notice to Owner Timely?
- Lien Timely Recorded?
- Copy of Lien Timely Served?
- Sworn Statement Account responded?
- Lien More Than One Year Old?

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Contractual Issues

- Proper Payments Made?
- “Pay When Paid” Clause?
- Waiver or Releases Properly Signed?

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Contractual Resolutions

- Affidavits
- Indemnity Agreements

- **(Note: speak to underwriter)**

Non-Litigation Strategies

- Bond off the lien
- Issue Joint Checks
- Presuit mediation
- Binding arbitration (Chapter 45/AAA)
- Issue Contractor Final Affidavit
- Shut job down/terminate NOC

Litigation Strategies

- Show Cause Order under F.S. 713.21
- Interpleader
- Counterclaim for Fraudulent Lien

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IV. Conclusion

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164 So.3d 1266
District Court of Appeal of Florida,
First District.

JAX UTILITIES MANAGEMENT, INC., Appellant,
v.
HANCOCK BANK, A Foreign Corporation, and Plummer Creek, LLC, A Florida Corporation, Appellees.

No. 1D14–664.
|
June 11, 2015.
|
Rehearing Denied June 11, 2015.

Synopsis

Background: Contractor brought an action against construction loan lender asserting equitable lien and unjust enrichment claims. The Circuit Court, Duval County, Waddell A. Wallace, J., granted summary judgment for the lender. Contractor appealed.

Holdings: The District Court of Appeal, Lewis, C.J., held that:

[1] one-year statute of limitations began to run from last furnishing of labor, services, or material for the improvement of real property, barring contractor's equitable lien claim, and

[2] as a matter of first impression, statute governing responsibilities of construction loan lenders precluded contractor's common law claims.

Affirmed; rehearing denied.

West Headnotes (3)

[1] Limitation of Actions
Equitable Actions and Remedies

One-year statute of limitations for an action to enforce an equitable lien began to run from the last furnishing of labor, services, or material for the improvement of real property, and not from construction loan lender's initiation of foreclosure proceeding, and had long expired by the time subdivision development contractor had initially filed its equitable lien complaint. West's F.S.A. § 95.11(5)(b).

Cases that cite this headnote

[2] Implied and Constructive Contracts
Unjust enrichment

Mechanics' Liens
Lien or Rights as to Money Due Principal Contractor

Statute governing situations where a construction loan lender determines it will no longer fund a loan, the proceeds of which have not all been disbursed, precluded contractor's common law claims of equitable lien and unjust enrichment because the statute expressly precluded such claims and was so repugnant to the existence of common law relief that they could not coexist; statute immunized lenders who provided notice to contractor of ceasing further advances, prescribed damages if notice was not provided, and stated that the cause of action could not become basis for an equitable lien claim. West's F.S.A. 713.3471(2) (2011).

Cases that cite this headnote

[3] Statutes
Common or civil law

While courts generally presume that the common law remains in effect when a statute is enacted in derogation of the common law, this presumption is inapplicable where the statute expressly says otherwise or is so repugnant to the common law that the two cannot coexist.

Cases that cite this headnote

Attorneys and Law Firms

***1267** Diane G. Cassaro, Jacksonville; David S. Wainer, III of Ford, Miller & Wainer, P.A., Jacksonville, for Appellant.

Matthew J. Conigliaro of Carlton Fields Jorden Burt, P.A., Tampa, and Jason A. Perkins of Carlton Fields Jorden Burt, P.A., Orlando, for Hancock Bank, a Foreign Corporation; Lawrence J. Hamilton, II and Barbara Cocciola of Holland & Knight, LLP, Jacksonville, for Plummer Creek, LLC, a Florida Corporation.

ON MOTION FOR REHEARING OR CLARIFICATION

LEWIS, C.J.

We deny Appellant's Motion for Rehearing or Clarification, but we withdraw our previously issued opinion and substitute this opinion in its place.

Appellant, Jax Utilities Management, Inc. ("Jax"), challenges the trial court's entry of a final summary judgment in favor of Appellee, Hancock Bank, arguing that the trial court erred by holding that (1) the statute of limitations set forth in section 95.11(5)(b), Florida Statutes (2011), barred Jax's equitable lien claim, and (2) section 713.3471, Florida Statutes (2011), precluded Jax's common law claims of equitable ***1268** lien and unjust enrichment. For the reasons that follow, we affirm.

BACKGROUND

On December 29, 2011, Jax brought an action against Appellees based on a failed housing development project. In an Amended Complaint, Jax asserted a breach of contract claim against Plummer Creek, LLC, (Count I) and equitable lien and unjust enrichment claims against Hancock Bank (Counts II and III, respectively). Hancock Bank moved for summary judgment based upon its affirmative defenses that section 95.11(5)(b), Florida Statutes, barred Jax's equitable lien claim and section 713.3471, Florida Statutes, precluded both of Jax's common law claims.

The parties' summary judgment evidence established in part the following: In December 2005, Plummer Creek, as owner, and Jax, as contractor, entered into a Standard Form Agreement for the development of the project, which entailed the construction of "429 builder lots and amenities." In January 2006, Plummer Creek, as borrower, and Peoples First Community Bank ("Peoples First"), as lender, entered into a Loan Agreement to fund the development. The Loan Agreement was for the principal amount of $15,975,000 and was to be evinced by a Note and used "to finance the purchase of land ... and to construct improvements thereon for the engineering, planning and development of 429 single family building lots and other improvements that will comprise Plummer Creek Subdivision, together with such other improvements necessary or desirable to service the Project." Under the Loan Agreement, Plummer Creek was required to make scheduled payments to Peoples First and to submit pay requests. Plummer Creek's failure to make a scheduled payment, a material adverse change in Plummer Creek's financial condition, or any one of the other enumerated events constituted a default under the Loan Agreement. Between 2006 and 2009, Plummer Creek performed its obligations under the Loan Agreement.

On May 28, 2009, however, Plummer Creek's sole source capital, Stokes Land Group, was informed by its investors that they would no longer fund the project. On June 1, 2009, Stokes Land Group informed Peoples First that it was no longer able to provide capital and make payments on the loan in light of its investors' decision. As such, in June 2009, Peoples First notified Plummer Creek that it would cease making further advances under the Loan Agreement. On June 27, 2009, Plummer Creek missed an interest payment. Although on June 30, 2009, Jax submitted two pay applications to Plummer Creek, in the amounts of $11,922.98 and $468,680.10, Plummer Creek failed to pay them and failed to submit them to Peoples First. In December 2009, pursuant to a Purchase and Assumption Agreement with the Federal Deposit Insurance Corporation as receiver of Peoples First, Hancock Bank assumed Peoples First's assets and liabilities, including the Note, Mortgage, and Loan Documents relating to the subject property. On March 21, 2011, Hancock Bank initiated foreclosure proceedings against the project. In September 2011, Hancock Bank obtained a Final Judgment of Foreclosure against Plummer Creek in the amount of $18,884,800.38; and in January 2012, a Certificate of Sale and Certificate of Title were filed. Based upon evidence relating to Construction Acceptance Checklists, Jax claimed that its last day on the job was June 20, 2009, while Hancock Bank ***1269** claimed it was May 14, 2010. [1]

The trial court entered a Final Summary Judgment in favor of Hancock Bank. The trial court concluded that Jax's equitable lien claim was barred by the one-year statute of limitations set forth in section 95.11(5)(b), Florida Statutes, regardless of which party's position about Jax's last day on the job was correct. In doing so, the trial court rejected Jax's argument that the statute of limitations did not begin to run until

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the equitable lien claim accrued upon the initiation of the foreclosure proceeding. The trial court further concluded that Jax's equitable lien and unjust enrichment claims were precluded by section 713.3471, Florida Statutes, and reasoned that the Legislature clearly intended to alter the common law and that the statute is so repugnant to Jax's common law claims that they cannot coexist. This appeal followed.

ANALYSIS

Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Haynes v. Universal Prop. & Cas. Ins. Co.*, 120 So.3d 651, 653 (Fla. 1st DCA 2013). An order granting a motion for summary judgment is reviewed *de novo*. *Id.* Similarly, a trial court's interpretation of a statute is reviewed *de novo*. *M.D.C. v. B.N.M.J.*, 117 So.3d 489, 490 (Fla. 1st DCA 2013).

Construction of Section 95.11(5)(b)

[1] Jax first argues that the statute of limitations set forth in section 95.11(5)(b), Florida Statutes, began to run not from the last furnishing of labor, services, or material, but from the initiation of the foreclosure proceeding. We disagree.

"Except as provided in subsection (2) [fraud and products liability] and in s. 95.051 [tolling] and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues." § 95.031, Fla. Stat. (2011). "A cause of action accrues when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. "An action to enforce an equitable lien arising from the furnishing of labor, services, or material for the improvement of real property" must be commenced within one year. § 95.11(5)(b), Fla. Stat. (2011).

By its plain language, section 95.11(5)(b) requires that a claim for equitable lien be brought within one year of the last furnishing of labor, services, or material for the improvement of real property. *Roehner v. Atl. Coast Dev. Corp.*, 356 So.2d 1296, 1297 (Fla. 4th DCA 1978) ("This is an appeal from a denial of a motion to dismiss a complaint to enforce an equitable lien, said complaint filed in excess of one year after the last furnishing of labor, services or material. We reverse upon the authority of s 95.11(5)(b) (Fla.Stat.1975) which unequivocally requires such a suit to be filed within one year after the last furnishing of labor, services or material for the improvement of real property."); *see also Westburne Supply, Inc. v. Cmty. Villas Partners, Ltd.*, 508 So.2d 431, 434–35 (Fla. 1st DCA 1987) (finding that the one-year statute of limitations on the appellant's equitable lien claim began running on the day the last materials were supplied for the construction of an apartment complex, and noting that "an equitable lien arises at the time of the transaction from which it springs"); *Haney v. Holmes*, 364 So.2d 81, 82 (Fla. 2d DCA 1978) (explaining that if ***1270** section 95.11(5)(b) were the applicable provision, it would have barred the appellant's claim for foreclosure of an equitable lien where the complaint alleged that the last work on the real property was performed on or about February 27, 1975, and the complaint was filed on September 3, 1976).

Here, Jax claims that its last day on the job was June 20, 2009, while Hancock Bank claims it was May 14, 2010. In either case, section 95.11(5)(b)'s one-year statute of limitations, which runs from the last furnishing of labor, services, or material for the improvement of real property, had long expired by the time Jax initially filed its complaint in December 2011. Therefore, the trial court correctly determined that regardless of whether Jax's last day of work on the project was on June 20, 2009, as Jax argued, or on May 14, 2010, as Hancock Bank contended, Jax filed its December 29, 2011, lawsuit too late as it did not bring suit within the one-year period provided by section 95.11(5)(b). As such, like the trial court, we reject Jax's argument that the statute of limitations period ran from when Hancock Bank initiated foreclosure proceedings.

Construction of Section 713.3471

[2] Turning now to Jax's second argument, Jax contends that the trial court misapplied section 713.3471, Florida Statutes, to preclude common law relief under the facts of this case. Hancock Bank, on the other hand, argues that the trial court correctly applied section 713.3471 to preclude Jax's common law claims of equitable lien and unjust enrichment because the statute expressly precludes such claims and is so repugnant to the existence of common law remedies that the two cannot coexist. However, both parties agree that this is an issue of first impression for a Florida appellate court. For the reasons that follow, we agree with Hancock Bank.

Section 713.3471, Florida Statutes (2011), was enacted in 1992, is part of the Construction Lien Law, and is titled

"Lender responsibilities with construction loans." Section 713.3471(2) defines a lender's responsibilities to a contractor for construction work where the lender decides to stop making advances prior to the distribution of all the construction loan funds. Subsection (2)(a) sets forth a lender's duties and provides for no liability if those duties are satisfied:

> (2)(a) Within 5 business days after a lender makes a final determination, prior to the distribution of all funds available under a construction loan, that the lender will cease further advances pursuant to the loan, the lender shall serve written notice of that decision on the contractor and on any other lienor who has given the lender notice. The lender shall not be liable to the contractor based upon the decision of the lender to cease further advances if the lender gives the contractor notice of such decision in accordance with this subsection and the decision is otherwise permitted under the loan documents.

§ 713.3471(2)(a), Fla. Stat. Subsections (2)(b) and (2)(c) define a lender's liability where it fails to provide the requisite notice:

> (b) The failure to give notice to the contractor under paragraph (a) renders the lender liable to the contractor to the extent of the actual value of the materials and direct labor costs furnished by the contractor plus 15 percent for overhead, profit, and all other costs from the date on which notice of the lender's decision should have been served on the contractor and the date on which notice of the lender's decision is served on the contractor. The lender and the contractor may agree in writing to any other reasonable method for determining the ***1271** value of the labor, services, and materials furnished by the contractor.
>
> (c) The liability of the lender shall in no event be greater than the amount of undisbursed funds at the time the notice should have been given unless the failure to give notice was done for the purpose of defrauding the contractor. The lender is not liable to the contractor for consequential or punitive damages for failure to give timely notice under this subsection. The contractor shall have a separate cause of action against the lender for damages sustained as the result of the lender's failure to give timely notice under this subsection. Such separate cause of action may not be used to hinder or delay any foreclosure action filed by the lender, may not be the basis of any claim for an equitable lien or for equitable subordination of the mortgage lien, and may not be asserted as an offset or a defense in the foreclosure case.

§ 713.3471(2)(b)-(c), Fla. Stat.

To discern legislative intent, courts first look to the plain language of a statute, whereby "[t]he plain and ordinary meaning of the words of a statute must control." *Marrero v. State*, 71 So.3d 881, 886–87 (Fla.2011). Section 713.3471(2) governs construction loan lenders who, prior to the distribution of all funds available under a loan, make a final determination that they will cease further advances. Such lenders must give timely notice to the contractor and any other lienor who has given the lender notice. If the lender complies with this notification duty (and its decision is permitted under the loan documents), it has no liability to the contractor or lienor. § 713.3471(2)(a), Fla. Stat.

If the lender fails to comply with this notification duty, it is liable to the contractor through a statutory cause of action, but the damages are calculated as prescribed by the statute, unless the noncompliance was intended to defraud the contractor. § 713.3471(2)(b)-(c), Fla. Stat. Furthermore, where the lender fails to comply with the notice requirement, the statutory claim may not interfere with any foreclosure action and "may not be the basis of any claim for an equitable lien or for equitable subordination of the mortgage lien ...." § 713.3471(2)(c), Fla. Stat.

In effect, section 713.3471(2) provides benefits and burdens to lenders and contractors. Prior to the statute's enactment in 1992, case law prohibited lenders from misleading contractors about advances, but did not impose an obligation to notify contractors of a decision to cease making advances. *See Giffen Indus. of Jacksonville, Inc. v. Se. Assocs., Inc.*, 357 So.2d 217 (Fla. 1st DCA 1978); *J.G. Plumbing Serv., Inc. v. Coastal Mortg. Co.*, 329 So.2d 393 (Fla. 2d DCA 1976). Section 713.3471(2) changed the common law by imposing on lenders an affirmative duty to notify, thereby protecting contractors from continuing work on projects without notice that further funds will not be advanced. *See Whitehead v. Tyndall Federal Credit Union*, 46 So.3d 1033, 1035–36 (Fla. 1st DCA 2010) ("The obvious purpose of [section 713.3471(2)] is to prevent exactly what occurred here: the unjust termination of payments to a contractor who continues work, without any notice from the lender

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that payments will be terminated."). Section 713.3471(2) constitutes comprehensive regulation in this narrow area.

[3] While courts generally presume that the common law remains in effect when a statute is enacted in derogation of the common law, this presumption is inapplicable where the statute expressly says otherwise or "is so repugnant to the common law that the two cannot coexist." *Major League Baseball v. Morsani*, 790 So.2d 1071, 1077–78 (Fla.2001). ***1272** Section 713.3471 does both. Section 713.3471(2) expressly immunizes lenders who provide notice, prescribes the damages where notice is not provided, and states that the cause of action cannot become the basis for an equitable lien claim. Moreover, a common law claim would conflict with the statute. If a lender complies with the statute, it has no liability. If the lender fails to comply, a contractor may seek damages as prescribed by the statute.

Notably, section 713.3471 lacks a provision expressly preserving common law remedies. The Legislature routinely includes such provisions where it does not intend to displace the common law, and the omission of such a provision reinforces the conclusion that section 713.3471 displaces the common law remedies. *See, e.g.*, § 83.808(1), Fla. Stat. (2012) ("Nothing in ss. 83.801–83.809 shall be construed as in any manner impairing or affecting the right of parties to create liens by special contract or agreement nor shall it in any manner impair or affect any other lien arising at common law...."); § 403.191(1), Fla. Stat. (2011) ("Nothing contained herein shall be construed to abridge or alter rights of action or remedies in equity under the common law...."); § 403.760(5)(e), Fla. Stat. (2011) ("Nothing in this section shall affect or modify in any way the obligations or liability of any person under any other provisions of state or federal law, including common law...."); § 494.002, Fla. Stat. (2011) ("Sections 494.001–494.0077 do not limit any statutory or common-law right of any person to bring any action in any court for any act involved in the mortgage loan business or the right of the state to punish any person for any violation of any law."); § 517.241(2), Fla. Stat. (2011) ("Nothing in this chapter limits any statutory or common-law right of a person to bring an action in a court for an act involved in the sale of securities or investments, or the right of the state to punish any person for a violation of a law."); § 607.0833, Fla. Stat. (2011) ("Nothing in this section shall be deemed to deny, limit, or restrict the powers of guaranty or warranty of any corporation at common law or under any statute.").

Here, Peoples First was a construction loan lender that decided to cease further advances before all the loan funds had been distributed. Though the record does not indicate that Peoples First ever served notice on Jax pursuant to section 713.3471(2), Jax elected not to bring a statutory claim and instead sued Hancock Bank (as successor-in-interest to Peoples First) for equitable lien and unjust enrichment. However, we find that section 713.3471(2) precluded Jax's common law claims and the trial court properly entered summary judgment in Hancock Bank's favor on this issue because the plain language of section 713.3471(2) evinces a legislative intent to displace the common law remedies and the statute is so repugnant to common law remedies that the two cannot coexist.

CONCLUSION

Accordingly, the trial court correctly held that the statute of limitations set forth in section 95.11(5)(b), Florida Statutes, barred Jax's equitable lien claim and section 713.3471, Florida Statutes, precluded Jax's common law claims of equitable lien and unjust enrichment.

Therefore, we AFFIRM the trial court's Final Summary Judgment.

MARSTILLER and OSTERHAUS, JJ., concur.

All Citations

164 So.3d 1266, 40 Fla. L. Weekly D1381

Footnotes

1 During the course of the proceedings, the trial court entered a Consent for Final Judgment in favor of Jax against Plummer Creek in the amount of $476,523.08 in principal, plus interest and costs for a total of $587,737.70, which shall bear interest.

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150 So.3d 815
District Court of Appeal of Florida,
Second District.

ANDRE FRANKLIN, INC., a Florida corporation, and Andre Franklin, individually, Appellants,
v.
Herb WAX and Jill Wax, Husband and Wife, Appellees.

No. 2D14–1151.
|
Oct. 8, 2014.

Synopsis

Background: Contractor against whom homeowners brought action to resolve dispute over payment for services filed motion to compel arbitration and motion to abate proceedings pending arbitration. The Circuit Court, Hillsborough County, Charles E. Bergmann, J., denied motion. Contractor appealed.

[Holding:] The District Court of Appeal, Sleet, J., held that contractor did not waive its contractual right to arbitration by filing a counterclaim simultaneously with its motion to compel arbitration, motion to dismiss, and motion to abate.

Reversed and remanded.

West Headnotes (5)

[1] Alternative Dispute Resolution
Scope and standards of review

A trial court's order denying a motion to compel arbitration is reviewed de novo.

Cases that cite this headnote

[2] Alternative Dispute Resolution
Arbitration favored; public policy

Public policy favors arbitration.

Cases that cite this headnote

[3] Alternative Dispute Resolution
Waiver or Estoppel

The contractual right to arbitration is subject to waiver.

Cases that cite this headnote

[4] Alternative Dispute Resolution
Suing or participating in suit

A party may waive its contractual right to arbitrate by actively participating in a lawsuit or taking action inconsistent with that right.

Cases that cite this headnote

[5] Alternative Dispute Resolution
Suing or participating in suit

Contractor against whom homeowners brought action to resolve dispute over payment for services did not waive its contractual right to arbitration by filing a counterclaim simultaneously with its motion to compel arbitration, motion to dismiss, and motion to abate; contractor did not implement discovery or take other actions that were inconsistent with the right to arbitrate the dispute.

Cases that cite this headnote

Attorneys and Law Firms

***815** Paul J. Kelly of Paul J. Kelly, P.A., St. Petersburg, for Appellants.

Marie Tomassi and Anne C. McAdams of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., St. Petersburg, for Appellees.

Opinion

***816** SLEET, Judge.

Andre Franklin, Inc., and Andre Franklin, individually, (collectively referred to as "Franklin"), appeal the trial court's denial of a motion to compel arbitration and motion to abate proceedings pending arbitration. Because Franklin did not

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take action inconsistent with its right to arbitration, it did not waive its right to arbitration. [1] Accordingly, we reverse.

In January 2007, Herb and Jill Wax contracted with Franklin to restore a historic home they had purchased. Within the contract, the parties agreed to, among other things, arbitrate disputes. After five years a disagreement arose relating to payment. Franklin subsequently recorded a claim of lien against the Waxes' home.

In November 2012, the Waxes filed a four-count complaint against Franklin alleging (1) a show cause action pursuant to section 713.21, Florida Statutes (2012), for issuance of a summons requiring Franklin to show cause why the claim of lien should not be vacated; (2) a fraudulent lien; (3) slander of title; and (4) breach of contract.

Franklin responded by simultaneously filing a motion to enforce arbitration, a motion to abate, a motion to dismiss for failure to comply with Florida Rule of Civil Procedure 1.130(a) and for failing to file presuit notice required by section 558.004, Florida Statutes (2012), an answer and affirmative defenses, and counterclaims for foreclosure of lien and breach of contract. All motions were set for a hearing. After the July 3, 2013, hearing the trial court granted, in part, Franklin's motion to dismiss and allowed the Waxes to amend their complaint to include presuit notice pursuant to section 558.004.

In November 2013, the Waxes filed their amended complaint. Franklin responded by simultaneously filing its renewed motion to enforce arbitration, renewed motion to abate, and answer and affirmative defenses to amended complaint. The trial court held a hearing on the motions on February 4, 2014. The Waxes argued that Franklin waived its right to arbitrate by filing counterclaims and arguing the motion to dismiss during the first hearing. The trial court agreed with the Waxes and concluded that Franklin waived its right to arbitration. The trial court's principal reason for finding that Franklin waived its right to arbitrate was Franklin's filing of a counterclaim for breach of contract. The court concluded that Franklin had sought affirmative relief from the court by filing that claim and sought to enforce the contract. The court entered its order denying Franklin's motion to compel arbitration and motion to abate.

[1] **[2]** **[3]** **[4]** We review a trial court's order denying a motion to compel arbitration de novo. *See Waterhouse Constr. Group, Inc. v. 5891 SW 64th St., LLC*, 949 So.2d 1095, 1097 (Fla. 3d DCA 2007). We note that Florida public policy favors arbitration. *See SCG Harbourwood, LLC v. Hanyan*, 93 So.3d 1197, 1199 (Fla. 2d DCA 2012). The contractual right to arbitration, however, is subject to waiver. *See Mora v. Abraham Chevrolet–Tampa, Inc.*, 913 So.2d 32, 34 (Fla. 2d DCA 2005). A party may waive its contractual right to arbitrate by actively participating in a lawsuit or taking action inconsistent with that right. *Waterhouse*, 949 So.2d at 1100. The Waxes argue that Franklin acted inconsistently with its right to arbitrate by filing the counterclaims and rely on *Coral 97 Associates,* ***817** *Ltd. v. Chino Electric, Inc.*, 501 So.2d 69 (Fla. 3d DCA 1987), for support.

In *Coral*, the parties entered into a contract where Chino agreed to make certain improvements to property owned by Coral. *Id.* at 70. The parties agreed to arbitrate disputes. *Id.* Eventually, Chino instituted an action against Coral for foreclosure of a mechanic's lien and breach of contract without requesting arbitration. *Id.* Coral filed a motion to dismiss the complaint arguing that Chino failed to state a cause of action and failed to comply with contractual provisions requiring arbitration. *Id.* Coral also filed a counterclaim for breach of contract. *Id.* Prior to the hearing on the motion to dismiss, Coral filed a notice of taking Chino's deposition. *Id.* The Third District held that Coral waived its right to arbitration by taking the inconsistent action of filing a counterclaim and noted that a party may waive arbitration either by taking an active part in the litigation or by undertaking an action inconsistent with that right. *Id.*

However, a year after deciding *Coral*, the Third District clarified its holding in *Coral* when it decided *Concrete Design Structures, Inc. v. P.L. Dodge Foundation, Inc.*, 532 So.2d 1334 (Fla. 3d DCA 1988). In *Concrete*, the court held that filing a counterclaim and motion to dismiss the complaint at the same time a motion to compel arbitration is filed did not constitute a waiver of the right to arbitration. *Id.* at 1334–35. The court clarified that in *Coral* "it was the act of implementing discovery, following the simultaneous filings of the counterclaim and motions to arbitrate and dismiss, that was held inconsistent with and thus a waiver of the arbitration right." *Id. See also Avid Eng'g., Inc. v. Orlando Marketplace Ltd.*, 809 So.2d 1 (Fla. 5th DCA 2001) (holding that filing a counterclaim with a motion to arbitrate did not waive the right to arbitration).

[5] In light of the holdings in *Concrete* and *Avid*, we conclude that Franklin did not waive its contractual right

to arbitrate by filing a counterclaim simultaneously with its motion to compel arbitration, motion to dismiss, and motion to abate. Franklin did not implement discovery. Franklin's filing of the counterclaims and motion to dismiss at the same time as a motion to compel arbitration is filed, without more, does not waive the contractual right to arbitrate. *See Concrete*, 532 So.2d at 1334.

Accordingly, we reverse the order denying the motion to compel arbitration and the motion to abate pending arbitration and remand for proceedings consistent with this opinion.

Reversed and remanded.

NORTHCUTT and CRENSHAW, JJ., Concur.

All Citations

150 So.3d 815, 39 Fla. L. Weekly D2107

Footnotes

1 In this opinion, we do not reach the issue of whether any of the claims raised in the complaint are arbitrable.

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101 So.3d 899
District Court of Appeal of Florida,
Fourth District.

Dennis BARBER, Appellant,
v.
DAHLIA AT PLANTATION HOMEOWNERS ASSOCIATION, INC., Appellee.

No. 4D11–3699.
|
Nov. 14, 2012.
|
Rehearing Denied Dec. 19, 2012.

Synopsis

Background: Action was commenced to determine validity of mechanic's lien on real property. The Circuit Court, Seventeenth Judicial Circuit, Broward County, John B. Bowman, J., entered summary judgment in favor of property owner upon finding that he was not properly served notice of lienor's claim. Lienor appealed.

Holding: The District Court of Appeal held that factual dispute as to whether lienor was a "laborer" who was exempt from notice requirement precluded summary judgment.

Reversed and remanded.

West Headnotes (1)

[1] Judgment
Particular Cases

Genuine issue of material fact existed as to whether lienor was a "laborer" who was not required to serve notice of his claim on real property owner, thus precluding summary judgment in action to determine validity of mechanic's lien on real property. West's F.S.A. § 713.06(2)(a).

Cases that cite this headnote

Attorneys and Law Firms

***899** Martin W. Lester, Fort Walton Beach, for appellant.

John S. Penton, Jr., of Cole, Scott & Kissane, P.A., West Palm Beach, for appellee.

Opinion

PER CURIAM.

In this mechanic's lien case, Dennis Barber challenges an order of final summary judgment in favor of the property owner. Section 713.06, Florida Statutes (2008), allows for a lien on real property where the lienor has served notice of his claim on the property owner. An exception to the notice requirement is made for "laborers." *See* § 713.06(2)(a), Fla. Stat. It was undisputed that Barber did not serve the notice required by section 713.06(2)(a). The trial court thus entered final summary judgment in favor of the property owner upon finding that, as a matter of law, Barber was not a "laborer." *See* § 713.01(16), Fla. Stat. (2008) (defining "laborer"). As we conclude that genuine issues of material fact remain concerning Barber's status as ***900** a "laborer," we reverse the summary judgment and remand for further proceedings. *See Progressive Express Ins. Co. v. Camillo*, 80 So.3d 394, 399 (Fla. 4th DCA 2012) ("A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."). *Morgan v. Goodwin*, 355 So.2d 217 (Fla. 1st DCA 1978), is distinguishable on its facts and not dispositive of the instant case.

Reversed and Remanded.

STEVENSON, GERBER and LEVINE, JJ., concur.

All Citations

101 So.3d 899, 37 Fla. L. Weekly D2640

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97 So.3d 909
District Court of Appeal of Florida,
Fourth District.

BAYVIEW CONSTRUCTION CORPORATION, Petitioner,
v.
JOMAR PROPERTIES, LLC., et al., Respondents.

No. 4D11–4426.
|
Aug. 29, 2012.
|
Rehearing Denied Oct. 19, 2012.

Synopsis

Background: Contractor brought action against property owner for breach of contract and to foreclose a construction lien. Property owner obtained a transfer bond to replace the lien and, after entry of an arbitration award in favor of contractor for less than the amount originally claimed, moved to reduce the amount of the bond to conform to the amount still sought by contractor. The Nineteenth Judicial Circuit Court, Martin County, Sherwood Bauer, J., reduced the amount of the bond. Contractor filed petition for writ of certiorari.

Holdings: On rehearing, the District Court of Appeal held that:

[1] reduction of transfer bond caused material harm to contractor that could not be remedied on appeal, but

[2] trial court did not depart from essential requirements of law by reducing the transfer bond based on the evidence before it.

Petition denied.

West Headnotes (4)

[1] Certiorari
Time of Taking Proceedings

An unauthorized motion for rehearing from a nonfinal order does not defer rendition and delay the time for seeking certiorari relief.

Cases that cite this headnote

[2] Certiorari
Inadequacy of remedy by appeal or writ of error

Certiorari
Particular proceedings in civil actions

Mechanics' Liens
Sufficiency of bond

Trial court's reduction of transfer bond that replaced contractor's construction lien caused material harm to contractor that could not be remedied on appeal, as necessary to entitle contractor to certiorari relief; contractor's claims for interest and attorney fees continued to accrue, and such claims would not be sufficiently protected by the reduced bond amount, since surety would not be liable for any damages above the bond amount and there was no guarantee that property owner would be able to pay the difference. West's F.S.A. § 713.24.

Cases that cite this headnote

[3] Mechanics' Liens
Liabilities on bonds

A surety's liability on a transfer bond is limited to the face amount of the transfer bond. West's F.S.A. § 713.24.

Cases that cite this headnote

[4] Mechanics' Liens
Sufficiency of bond

Trial court did not depart from the essential requirements of law, as necessary to entitle contractor to certiorari relief, by reducing amount of transfer bond that replaced contractor's construction lien based on the evidence before the court, where property owner and its surety gave contractor notice of the evidence supporting their verified motion to reduce transfer bond to be heard at a motion calendar hearing and, at the time of the hearing,

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although contractor represented that it had affidavits in opposition to the motion, it did not file or serve its affidavits before the hearing. West's F.S.A. § 713.24.

Cases that cite this headnote

Attorneys and Law Firms

***910** Ryan V. Kadyszewski and John A. Hockin of Linkhost & Hockin, P.A., Jupiter, for petitioner.

Raymond M. Masciarella II of Raymond M. Masciarella II, P.A., North Palm Beach, for respondents.

ON MOTION FOR REHEARING

PER CURIAM.

We grant the respondents' motion for rehearing, withdraw our prior opinion, and substitute the following in its place.

Bayview Construction Corporation (Bayview), the plaintiff below, filed a petition for writ of certiorari, seeking review of a nonfinal order granting the motion of the defendant Jomar Properties, L.L.C. (Jomar) and its surety, Accredited Surety and Casualty Company, Inc., for reduction in transfer bond. We deny the petition.

***911** Bayview sued Jomar for breach of a construction contract and also to foreclose its construction lien against Jomar's real property. Pursuant to section 713.24, Florida Statutes, Jomar transferred the construction lien to a bond in the amount of $1,602,455.40, which was calculated based on the face amount of the lien, which was $1,014.212.30.

The parties agreed to submit their dispute to binding arbitration. An arbitrator entered an award in Bayview's favor on the lien, but only in the amount of $633,087.80, reserving jurisdiction as to pre-judgment and post-judgment interest, and the entitlement and amount of attorney's fees. Thereafter, the arbitrator also awarded Bayview pre-judgment interest in the amount of $82,836.63 and found Bayview was entitled to attorney's fees. The trial court confirmed the arbitration award, but a dispute (not relevant here) has prevented the trial court from entering a final judgment.

Meanwhile, in September 2011, Jomar and its surety (the respondents in this proceeding) served a motion for reduction in transfer bond, which was verified by counsel. Based partly on Bayview's discovery responses, they represented that the amount which Bayview still sought now totaled only $1,297,991.70–which was $304,463.70 less than the amount of the transfer bond. They requested the court to reduce the transfer bond accordingly.

[1] The respondents set their motion for hearing on the trial court's motion calendar. At the hearing, they argued that the unrebutted evidence showed the bond was too high. Bayview suggested the matter should have been set for an evidentiary hearing and argued against reduction of the transfer bond, asserting that because the case was ongoing, there had been additional attorney's fees, costs, and interest since it last provided discovery. Bayview represented that the current total was approximately $1,524,985, which was very close to the amount of the bond. It explained that the most by which the transfer bond could be reduced was $77,470.40, but that if the bond were so reduced, then Bayview would have to seek an increase each month for the fees and interest generated that month. Bayview asked the court to consider affidavits which counsel had in hand showing the additional amounts that already had accrued, but the trial court refused to do so unless Bayview were to move for a subsequent hearing. After considering only the arbitrator's award, attorney's fees, and pre-judgment interest already determined, the trial court granted the respondents' motion and reduced the bond amount to $1,297.991.70. The court stated that if additional amounts were proved, Bayview could move to increase the bond, as often as weekly. After the trial court denied Bayview's motion for rehearing, Bayview sought certiorari relief from this court. [1]

[2] **[3]** Respondents argue that certiorari relief is not available because the trial court's order reducing the bond will not cause Bayview to suffer material injury for which there is no adequate remedy on appeal. We disagree. Before the issuance of the order, Bayview's claims against Jomar were secured to the extent of $1,602,455.40; as a result of the order, Bayview's claims, which continue to accrue, are secured only to the extent of an amount which is $226,993.30 *less* than the amount it claimed were its damages as of ***912** the hearing date. In the event Jomar is unable to pay the difference, or to increase the bond on Bayview's later request, Bayview may have no recourse, because a surety is liable only up to the face amount of the transfer bond. *Aetna Cas. and Sur. Co. v. Buck*, 594 So.2d 280, 283 (Fla.1992) (noting

that "the lienor is left with an unsecured judgment against the owner for any costs which exceed the remaining face amount of the bond"); *Smith Original Homes, Inc. v. Carpet King Carpets, Inc.*, 896 So.2d 844 (Fla. 2d DCA 2005) (reversing final judgment entered in favor of carpet company after trial court struck pleadings of home building company for failing to pay increase in the transfer bond; trial court imposed severe sanction without express statutory authority or findings of deliberate disregard or gross indifference to the court's order). *See generally Saul v. Basse*, 375 So.2d 290 (Fla. 2d DCA 1979) (granting certiorari relief as to order denying motion by mortgage holders to require foreclosed condominium unit owners to deposit accrued rent into registry of court pursuant to statute which contemplated establishment of secured fund with which to satisfy any monetary judgment, without which petitioners could be required to seek other sources to satisfy any judgment). The prospect that Bayview will be left with a partially unsecured judgment is a harm which is irreparable on final appeal. Therefore, we have certiorari jurisdiction to review the order granting the respondents' motion.

[4] However, we agree with respondents that the trial court did not depart from the essential requirements of the law by reducing the transfer bond based on the evidence before it. The respondents gave Bayview notice of the evidence supporting their verified motion to reduce transfer bond to be heard at a motion calendar hearing. At the time of the hearing, although Bayview represented that it had affidavits in opposition to the respondents' motion, it did not file or serve its affidavits before the hearing. Because Bayview had notice that the hearing was not an evidentiary one, it should not have expected to be able to present its affidavits for the first time at the hearing. "An affidavit must be served a reasonable time before the hearing at which it is to be used." Henry P. Trawick, Jr., FLORIDA PRACTICE AND PROCEDURE § 9:6 (2011 ed.) (citing *Tribune Co. v. Approved Personnel, Inc.*, 115 So.2d 170 (Fla. 1st DCA 1959)). Under the circumstances, we cannot say that the trial court departed from the essential requirements of law in granting respondents' motion based on what properly was before it at the time of the hearing. Moreover, the trial court invited Bayview to set another hearing if it wished to present its own affidavits and further advised Bayview it could file a motion to increase the bond as often as weekly.

Petition Denied.

STEVENSON, GROSS and TAYLOR, JJ., concur.

All Citations

97 So.3d 909, 37 Fla. L. Weekly D2077

Footnotes

1 The petition was timely filed within thirty days after the original order granting defendants' motion. Because a motion for rehearing is not authorized from a nonfinal order, such a motion does not defer rendition and delay the time for seeking certiorari relief. *McGee v. McGee*, 487 So.2d 412, 413 (Fla. 4th DCA 1986).

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The 2015 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 713
LIENS, GENERALLY

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CHAPTER 713
LIENS, GENERALLY

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PART I
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713.001 Short title of part.—This part may be cited as the "Construction Lien Law."
History.—s. 1, ch. 90-109.

713.01 Definitions.—As used in this part, the term:

(1) "Abandoned property" means all tangible personal property that has been disposed of on public property in a wrecked, inoperative, or partially dismantled condition.

(2) "Architect" means a person or firm that is authorized to practice architecture pursuant to chapter 481 or a general contractor who provides architectural services under a design-build contract authorized by s. 481.229(3).

(3) "Claim of lien" means the claim recorded as provided in s. 713.08.

(4) "Clerk's office" means the office of the clerk of the circuit court of the county in which the real property is located.

(5) "Commencement of the improvement" means the time of filing for record of the notice of

commencement provided in s. 713.13.

(6) "Contract" means an agreement for improving real property, written or unwritten, express or implied, and includes extras or change orders.

(7) "Contract price" means the amount agreed upon by the contracting parties for performing all labor and services and furnishing all materials covered by their contract and must be increased or diminished by the price of extras or change orders, or by any amounts attributable to changes in the scope of the work or defects in workmanship or materials or any other breaches of the contract; but no penalty or liquidated damages between the owner and a contractor diminishes the contract price as to any other lienor. If no price is agreed upon by the contracting parties, this term means the value of all labor, services, or materials covered by their contract, with any increases and diminutions, as provided in this subsection. Allowance items are a part of the contract when accepted by the owner.

(8) "Contractor" means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract. The term "contractor" includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by s. 489.103(16).

(9) "Direct contract" means a contract between the owner and any other person.

(10) "Engineer" means a person or firm that is authorized to practice engineering pursuant to chapter 471 or a general contractor who provides engineering services under a design-build contract authorized by s. 471.003(2)(i).

(11) "Extras or change orders" means labor, services, or materials for improving real property authorized by the owner and added to or deleted from labor, services, or materials covered by a previous contract between the same parties.

(12) "Final furnishing" means the last date that the lienor furnishes labor, services, or materials. Such date may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of final completion, and does not include correction of deficiencies in the lienor's previously performed work or materials supplied. With respect to rental equipment, the term means the date that the rental equipment was last on the job site and available for use.

(13) "Furnish materials" means supply materials which are incorporated in the improvement including normal wastage in construction operations; or specially fabricated materials for incorporation in the improvement, not including any design work, submittals, or the like preliminary to actual fabrication of the materials; or supply materials used for the construction and not remaining in the improvement, subject to diminution by the salvage value of such materials; and includes supplying rental equipment, but does not include supplying handtools. The delivery of materials to the site of the improvement is prima facie evidence of incorporation of such materials in the improvement. The delivery of rental equipment to the site of the improvement is prima facie evidence of the period of the actual use of the rental equipment from the delivery through the time the equipment is last available for use at the site, or 2 business days after the lessor of the rental equipment receives a written notice from the owner or the lessee of the rental equipment to pick up the equipment, whichever occurs first.

(14) "Improve" means build, erect, place, make, alter, remove, repair, or demolish any improvement over, upon, connected with, or beneath the surface of real property, or excavate any land, or furnish materials for any of these purposes, or perform any labor or services upon the improvements, including the furnishing of carpet or rugs or appliances that are permanently affixed to the real property and final construction cleanup to prepare a structure for occupancy; or perform any labor or services or furnish any materials in grading, seeding, sodding, or planting for landscaping purposes, including the furnishing of trees, shrubs, bushes, or plants that are planted on the real property, or in equipping any improvement with fixtures

or permanent apparatus or provide any solid-waste collection or disposal on the site of the improvement.

(15) "Improvement" means any building, structure, construction, demolition, excavation, solid-waste removal, landscaping, or any part thereof existing, built, erected, placed, made, or done on land or other real property for its permanent benefit.

(16) "Laborer" means any person other than an architect, landscape architect, engineer, surveyor and mapper, and the like who, under properly authorized contract, personally performs on the site of the improvement labor or services for improving real property and does not furnish materials or labor service of others.

(17) "Lender" means any person who loans money to an owner for construction of an improvement to real property, who secures that loan by recording a mortgage on the real property, and who periodically disburses portions of the proceeds of that loan for the payment of the improvement.

(18) "Lienor" means a person who is:

(a) A contractor;

(b) A subcontractor;

(c) A sub-subcontractor;

(d) A laborer;

(e) A materialman who contracts with the owner, a contractor, a subcontractor, or a sub-subcontractor; or

(f) A professional lienor under s. 713.03;

and who has a lien or prospective lien upon real property under this part, and includes his or her successor in interest. No other person may have a lien under this part.

(19) "Lienor giving notice" means any lienor, except a contractor, who has duly and timely served a notice to the owner and, if required, to the contractor and subcontractor, as provided in s. 713.06(2).

(20) "Materialman" means any person who furnishes materials under contract to the owner, contractor, subcontractor, or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement or, for specially fabricated materials, off the site of the improvement for the particular improvement, and who performs no labor in the installation thereof.

(21) "Notice by lienor" means the notice to owner served as provided in s. 713.06(2).

(22) "Notice of commencement" means the notice recorded as provided in s. 713.13.

(23) "Owner" means a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property. The term includes a condominium association pursuant to chapter 718 as to improvements made to association property or common elements. The term does not include any political subdivision, agency, or department of the state, a municipality, or other governmental entity.

(24) "Perform" or "furnish" when used in connection with the words "labor" or "services" or "materials" means performance or furnishing by the lienor or by another for him or her.

(25) "Post" or "posting" means placing the document referred to on the site of the improvement in a conspicuous place at the front of the site and in a manner that protects the document from the weather.

(26) "Real property" means the land that is improved and the improvements thereon, including fixtures, except any such property owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision.

(27) "Site of the improvement" means the real property which is being improved and on which labor or services are performed or materials furnished in furtherance of the operations of improving such real property. In cases of removal, without demolition and under contract, of an improvement from one lot, parcel, or tract of land to another, this term means the real property to which the improvement is removed.

(28) "Subcontractor" means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.

(29) "Sub-subcontractor" means a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 1, ch. 77-353; s. 1, ch. 80-97; s. 2, ch. 90-109; s. 1, ch. 91-102; s. 3, ch. 92-286; ss. 120, 317, ch. 94-119; s. 800, ch. 97-102; s. 2, ch. 98-135; s. 71, ch. 99-3; s. 2, ch. 2001-164; s. 4, ch. 2001-211; s. 2, ch. 2007-221.

Note.—Former s. 84.011.

713.012 Written notices, demands, or requests.—Notices, demands, or requests permitted or required under this part, except any required by s. 713.14, must be in writing.

History.—s. 3, ch. 2007-221.

713.015 Mandatory provisions for direct contracts.—

(1) Any direct contract greater than $2,500 between an owner and a contractor, related to improvements to real property consisting of single or multiple family dwellings up to and including four units, must contain the following notice provision printed in no less than 12-point, capitalized, boldfaced type on the front page of the contract or on a separate page, signed by the owner and dated:

ACCORDING TO FLORIDA'S CONSTRUCTION LIEN LAW (SECTIONS 713.001-713.37, FLORIDA STATUTES), THOSE WHO WORK ON YOUR PROPERTY OR PROVIDE MATERIALS AND SERVICES AND ARE NOT PAID IN FULL HAVE A RIGHT TO ENFORCE THEIR CLAIM FOR PAYMENT AGAINST YOUR PROPERTY. THIS CLAIM IS KNOWN AS A CONSTRUCTION LIEN. IF YOUR CONTRACTOR OR A SUBCONTRACTOR FAILS TO PAY SUBCONTRACTORS, SUB-SUBCONTRACTORS, OR MATERIAL SUPPLIERS, THOSE PEOPLE WHO ARE OWED MONEY MAY LOOK TO YOUR PROPERTY FOR PAYMENT, EVEN IF YOU HAVE ALREADY PAID YOUR CONTRACTOR IN FULL. IF YOU FAIL TO PAY YOUR CONTRACTOR, YOUR CONTRACTOR MAY ALSO HAVE A LIEN ON YOUR PROPERTY. THIS MEANS IF A LIEN IS FILED YOUR PROPERTY COULD BE SOLD AGAINST YOUR WILL TO PAY FOR LABOR, MATERIALS, OR OTHER SERVICES THAT YOUR CONTRACTOR OR A SUBCONTRACTOR MAY HAVE FAILED TO PAY. TO PROTECT YOURSELF, YOU SHOULD STIPULATE IN THIS CONTRACT THAT BEFORE ANY PAYMENT IS MADE, YOUR CONTRACTOR IS REQUIRED TO PROVIDE YOU WITH A WRITTEN RELEASE OF LIEN FROM ANY PERSON OR COMPANY THAT HAS PROVIDED TO YOU A "NOTICE TO OWNER." FLORIDA'S CONSTRUCTION LIEN LAW IS COMPLEX, AND IT IS RECOMMENDED THAT YOU CONSULT AN ATTORNEY.

(2)(a) If the contract is written, the notice must be in the contract document. If the contract is oral or implied, the notice must be provided in a document referencing the contract.

(b) The failure to provide such written notice does not bar the enforcement of a lien against a person who has not been adversely affected.

(c) This section may not be construed to adversely affect the lien and bond rights of lienors who are not in privity with the owner. This section does not apply when the owner is a contractor licensed under chapter 489 or is a person who created parcels or offers parcels for sale or lease in the ordinary course of business.

History.—s. 1, ch. 2003-177; s. 5, ch. 2005-227; s. 4, ch. 2007-221.

713.02 Types of lienors and exemptions.—

(1) Persons performing the services described in s. 713.03 shall have rights to a lien on real property as provided in that section.

(2) Persons performing services or furnishing materials for subdivision improvements as described in s. 713.04 shall have rights to a lien on real property as provided in that section.

(3) Persons who are in privity with an owner and who perform labor or services or furnish materials constituting an improvement or part thereof shall have rights to a lien on real property as provided in s. 713.05.

(4) Persons who are not in privity with an owner and who perform labor or services or furnish materials constituting a part of an improvement under the direct contract of another person shall have rights to a lien on real property as provided in s. 713.06.

(5) Any improvement for which the direct contract price is $2,500 or less shall be exempt from all other provisions of this part except the provisions of s. 713.05.

(6) The owner and contractor may agree that the contractor shall furnish a payment bond as provided in s. 713.23, and upon receipt of the bond the owner is exempt from the other provisions of this part as to that direct contract, but this does not exempt the owner from the lien of the contractor who furnishes the bond. If the bond is provided, it shall secure all liens subsequently accruing under this part as provided in s. 713.23.

(7) Notwithstanding any other provision of this part, no lien shall exist in favor of any contractor, subcontractor, or sub-subcontractor who is unlicensed as provided in s. 489.128 or s. 489.532. Notwithstanding any other provision of this part, if a contract is rendered unenforceable by an unlicensed contractor, subcontractor, or sub-subcontractor pursuant to s. 489.128 or s. 489.532, such unenforceability shall not affect the rights of any other persons to enforce contract, lien, or bond remedies and shall not affect the obligations of a surety that has provided a bond on behalf of the unlicensed contractor, subcontractor, or sub-subcontractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed as provided in s. 489.128 or s. 489.532.

History.—s. 1, ch. 63-135; s. 1, ch. 67-210; s. 35, ch. 67-254; s. 7, ch. 69-97; ss. 2, 17, ch. 77-353; s. 1, ch. 78-397; s. 2, ch. 87-74; s. 15, ch. 87-310; s. 3, ch. 88-397; s. 801, ch. 97-102; s. 5, ch. 2001-211; s. 3, ch. 2003-257; s. 6, ch. 2005-227; s. 5, ch. 2007-221.

Note.—Former s. 84.022.

713.03 Liens for professional services.—

(1) Any person who performs services as architect, landscape architect, interior designer, engineer, or surveyor and mapper, subject to compliance with and the limitations imposed by this part, has a lien on the real property improved for any money that is owing to him or her for his or her services used in connection with improving the real property or for his or her services in supervising any portion of the work of improving the real property, rendered in accordance with his or her contract and with the direct contract.

(2) Any architect, landscape architect, interior designer, engineer, or surveyor and mapper who has a direct contract and who in the practice of his or her profession shall perform services, by himself or herself or others, in connection with a specific parcel of real property and subject to said compliances and limitations, shall have a lien upon such real property for the money owing to him or her for his or her professional services, regardless of whether such real property is actually improved.

(3) No liens under this section shall be acquired until a claim of lien is recorded. No lienor under this section shall be required to serve a notice to owner as provided in s. 713.06(2) or an affidavit concerning unpaid lienors as provided in s. 713.06(3).

History.—s. 1, ch. 63-135; s. 1, ch. 65-456; s. 35, ch. 67-254; s. 3, ch. 77-353; s. 2, ch. 85-103; s. 3, ch. 90-109; s. 121, ch. 94-119; s. 802, ch. 97-102.

Note.—Former s. 84.031.

713.04 Subdivision improvements.—

(1) Any lienor who, regardless of privity, performs services or furnishes material to real property for the purpose of making it suitable as the site for the construction of an improvement or improvements shall be entitled to a lien on the real property for any money that is owed to her or him for her or his services or

materials furnished in accordance with her or his contract and the direct contract. The total amount of liens allowed under this section shall not exceed the amount of the direct contract under which the lienor furnishes labor, materials, or services. The work of making real property suitable as the site of an improvement shall include but shall not be limited to the grading, leveling, excavating, and filling of land, including the furnishing of fill soil; the grading and paving of streets, curbs, and sidewalks; the construction of ditches and other area drainage facilities; the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes; and the construction of canals and shall also include the altering, repairing, and redoing of all these things. When the services or materials are placed on land dedicated to public use and are furnished under contract with the owner of the abutting land, the cost of the services and materials, if unpaid, may be the basis for a lien upon the abutting land. When the services or materials are placed upon land under contract with the owner of the land who subsequently dedicates parts of the land to public use, the person furnishing the services or materials placed upon the dedicated land shall be entitled to a lien upon the land abutting the dedicated land for the unpaid cost of the services and materials placed upon the dedicated land, or in the case of improvements that serve or benefit real property that is divided by the improvements, to a lien upon each abutting part for the equitable part of the full amount due and owing. If the part of the cost to be borne by each parcel of the land subject to the same lien is not specified in the contract, it shall be prorated equitably among the parcels served or benefited. No lien under this section shall be acquired until a claim of lien is recorded. No notice of commencement shall be filed for liens under this section. No lienor shall be required to serve a notice to owner for liens under this section.

(2) If a lienor under this section who is not in privity with the owner serves a notice on the owner in accordance with the provisions of s. 713.06(2), payment of lienors by the owner under this section shall be governed by s. 713.06(3)(c), (d), (e), (f), (g), (h), and (4).

(3) The owner shall not pay any money on account of a direct contract before actual furnishing of labor and services or materials for subdivision improvements. Any payment not complying with such requirement shall not qualify as a proper payment under this chapter.

(4) The owner shall make final payment on account of a direct contract only after the contractor complies with s. 713.06(3)(d). Any payment not complying with such requirement shall not qualify as a proper payment under this chapter.

History.—s. 1, ch. 63-135; s. 2, ch. 65-456; s. 35, ch. 67-254; s. 2, ch. 80-97; s. 2, ch. 86-247; s. 803, ch. 97-102; s. 7, ch. 2005-227.

Note.—Former s. 84.041.

713.05 Liens of persons in privity.—A materialman or laborer, either of whom is in privity with the owner, or a contractor who complies with the provisions of this part shall, subject to the limitations thereof, have a lien on the real property improved for any money that is owed to him or her for labor, services, materials, or other items required by, or furnished in accordance with, the direct contract and for unpaid finance charges due under the lienor's contract. A materialman or laborer, in privity with the owner, or a contractor shall also have a lien on the owner's real property for any money that is owed to him or her for labor, services, or materials furnished to improve public property if the improvements to the public property are a condition of the permit to improve the owner's real property. No lien under this section shall be acquired until a claim of lien is recorded. A lienor who, as a subcontractor, sub-subcontractor, laborer, or materialman not in privity with the owner, commences to furnish labor, services, or material to an improvement and who thereafter becomes in privity with the owner shall have a lien for any money that is owed to him or her for the labor, services, or materials furnished after he or she becomes in privity with the owner. A lienor may record one claim of lien to cover both his or her work done in privity with the owner and not in privity with the owner. No lienor under this section shall be required to serve a notice to owner as

provided in s. 713.06(2). A lienor, except a laborer or materialman, who is in privity with the owner and claims a lien under this section shall furnish the contractor's affidavit required in s. 713.06(3)(d). A contractor may claim a lien for any labor, services, or materials furnished by another lienor for which he or she is obligated to pay the lienor, regardless of the right of the lienor to claim a lien; but, if the lienor claims a valid lien, the contractor shall not recover the amount of the lien recovered by the lienor, and the amount of the contractor's claim of lien may be reduced accordingly by court order. No person shall have a lien under this section except those lienors specified in it, as their designations are defined in s. 713.01.

History.—s. 1, ch. 63-135; s. 3, ch. 65-456; s. 2, ch. 67-210; s. 35, ch. 67-254; s. 4, ch. 77-353; s. 3, ch. 80-97; s. 1, ch. 96-383; s. 1763, ch. 97-102.

Note.—Former s. 84.051.

713.06 Liens of persons not in privity; proper payments.—

(1) A materialman or laborer, either of whom is not in privity with the owner, or a subcontractor or sub-subcontractor who complies with the provisions of this part and is subject to the limitations thereof, has a lien on the real property improved for any money that is owed to him or her for labor, services, or materials furnished in accordance with his or her contract and with the direct contract and for any unpaid finance charges due under the lienor's contract. A materialman or laborer, either of whom is not in privity with the owner, or a subcontractor or sub-subcontractor who complies with the provisions of this part and is subject to the limitations thereof, also has a lien on the owner's real property for labor, services, or materials furnished to improve public property if the improvement of the public property is furnished in accordance with his or her contract and with the direct contract. The total amount of all liens allowed under this part for furnishing labor, services, or material covered by any certain direct contract must not exceed the amount of the contract price fixed by the direct contract except as provided in subsection (3). No person may have a lien under this section except those lienors specified in it, as their designations are defined in s. 713.01.

(2)(a) All lienors under this section, except laborers, as a prerequisite to perfecting a lien under this chapter and recording a claim of lien, must serve a notice on the owner setting forth the lienor's name and address, a description sufficient for identification of the real property, and the nature of the services or materials furnished or to be furnished. A sub-subcontractor or a materialman to a subcontractor must serve a copy of the notice on the contractor as a prerequisite to perfecting a lien under this chapter and recording a claim of lien. A materialman to a sub-subcontractor must serve a copy of the notice to owner on the contractor as a prerequisite to perfecting a lien under this chapter and recording a claim of lien. A materialman to a sub-subcontractor shall serve the notice to owner on the subcontractor if the materialman knows the name and address of the subcontractor. The notice must be served before commencing, or not later than 45 days after commencing, to furnish his or her labor, services, or materials, but, in any event, before the date of the owner's disbursement of the final payment after the contractor has furnished the affidavit under subparagraph (3)(d)1. The notice must be served regardless of the method of payments by the owner, whether proper or improper, and does not give to the lienor serving the notice any priority over other lienors in the same category; and the failure to serve the notice, or to timely serve it, is a complete defense to enforcement of a lien by any person. The serving of the notice does not dispense with recording the claim of lien. The notice is not a lien, cloud, or encumbrance on the real property nor actual or constructive notice of any of them.

(b) If the owner, in his or her notice of commencement, has designated a person in addition to himself or herself to receive a copy of such lienor's notice, as provided in s. 713.13(1)(b), the lienor shall serve a copy of his or her notice on the person so designated. The failure by the lienor to serve such copy, however, does not invalidate an otherwise valid lien.

(c) The notice may be in substantially the following form and must include the information and the

warning contained in the following form:

WARNING! FLORIDA'S CONSTRUCTION LIEN LAW ALLOWS SOME UNPAID CONTRACTORS, SUBCONTRACTORS, AND MATERIAL SUPPLIERS TO FILE LIENS AGAINST YOUR PROPERTY EVEN IF YOU HAVE MADE PAYMENT IN FULL.

UNDER FLORIDA LAW, YOUR FAILURE TO MAKE SURE THAT WE ARE PAID MAY RESULT IN A LIEN AGAINST YOUR PROPERTY AND YOUR PAYING TWICE.

TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN RELEASE FROM US EVERY TIME YOU PAY YOUR CONTRACTOR.

NOTICE TO OWNER

To (Owner's name and address)

The undersigned hereby informs you that he or she has furnished or is furnishing services or materials as follows:

(General description of services or materials) for the improvement of the real property identified as (property description) under an order given by .

Florida law prescribes the serving of this notice and restricts your right to make payments under your contract in accordance with Section 713.06, Florida Statutes.

IMPORTANT INFORMATION FOR
YOUR PROTECTION

Under Florida's laws, those who work on your property or provide materials and are not paid have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

If your contractor fails to pay subcontractors or material suppliers or neglects to make other legally required payments, the people who are owed money may look to your property for payment, EVEN IF YOU HAVE PAID YOUR CONTRACTOR IN FULL.

PROTECT YOURSELF:

—RECOGNIZE that this Notice to Owner may result in a lien against your property unless all those supplying a Notice to Owner have been paid.

—LEARN more about the Construction Lien Law, Chapter 713, Part I, Florida Statutes, and the meaning of this notice by contacting an attorney or the Florida Department of Business and Professional Regulation.

(Lienor's Signature)
(Lienor's Name)
(Lienor's Address)

Copies to: (Those persons listed in Section 713.06(2)(a) and (b), Florida Statutes)

The form may be combined with a notice to contractor given under s. 255.05 or s. 713.23 and, if so, may be entitled "NOTICE TO OWNER/NOTICE TO CONTRACTOR."

(d) A notice to an owner served on a lender must be in writing, must be served in accordance with s. 713.18, and shall be addressed to the persons designated, if any, and to the place and address designated in the notice of commencement. Any lender who, after receiving a notice provided under this subsection, pays a contractor on behalf of the owner for an improvement shall make proper payments as provided in paragraph (3)(c) as to each such notice received by the lender. The failure of a lender to comply with this paragraph

renders the lender liable to the owner for all damages sustained by the owner as a result of that failure. This paragraph does not give any person other than an owner a claim or right of action against a lender for the failure of the lender to comply with this paragraph. Further, this paragraph does not prohibit a lender from disbursing construction funds at any time directly to the owner, in which event the lender has no obligation to make proper payments under this paragraph.

(e) A lienor, in the absence of a recorded notice of commencement, may rely on the information contained in the building permit application to serve the notice prescribed in paragraphs (a), (b), and (c).

(f) If a lienor has substantially complied with the provisions of paragraphs (a), (b), and (c), errors or omissions do not prevent the enforcement of a claim against a person who has not been adversely affected by such omission or error. However, a lienor must strictly comply with the time requirements of paragraph (a).

(3) The owner may make proper payments on the direct contract as to lienors under this section, in the following manner:

(a) If the description of the property in the notice prescribed by s. 713.13 is incorrect and the error adversely affects any lienor, payments made on the direct contract shall be held improperly paid to that lienor; but this does not apply to clerical errors when the description listed covers the property where the improvements are.

(b) The owner may pay to any laborers the whole or any part of the amounts that shall then be due and payable to them respectively for labor or services performed by them and covered by the direct contract, and shall deduct the same from the balance due the contractor under a direct contract.

(c) When any payment becomes due to the contractor on the direct contract, except the final payment:

1. The owner shall pay or cause to be paid, within the limitations imposed by subparagraph 2., the sum then due to each lienor giving notice prior to the time of the payment. The owner may require, and, in such event, the contractor shall furnish as a prerequisite to requiring payment to himself or herself, an affidavit as prescribed in subparagraph (d)1., on any payment made, or to be made, on a direct contract, but the furnishing of the affidavit shall not relieve the owner of his or her responsibility to pay or cause to be paid all lienors giving notice. The owner shall be under no obligation to any lienor, except laborers, from whom he or she has not received a notice to owner at the time of making a payment.

2. When the payment due is insufficient to pay all bills of lienors giving notice, the owner shall prorate the amount then due under the direct contract among the lienors giving notice pro rata in the manner prescribed in subsection (4). Lienors receiving money shall execute partial releases, as provided in s. 713.20(2), to the extent of the payment received.

3. If any affidavit permitted hereunder recites any outstanding bills for labor, services, or materials, the owner may pay the bills in full direct to the person or firm to which they are due if the balance due on the direct contract at the time the affidavit is given is sufficient to pay the bills and shall deduct the amounts so paid from the balance of payment due the contractor. This subparagraph shall not create any obligation of the owner to pay any person who is not a lienor giving notice.

4. No person furnishing labor or material, or both, who is required to serve a notice under paragraph (2)(a) and who did not serve the notice and whose time for service has expired shall be entitled to be paid by the owner because he or she is listed in an affidavit furnished by the contractor under subparagraph (c)1.

5. If the contract is terminated before completion, the contractor shall comply with subparagraph (d)1.

(d) When the final payment under a direct contract becomes due the contractor:

1. The contractor shall give to the owner a final payment affidavit stating, if that be the fact, that all lienors under his or her direct contract who have timely served a notice to owner on the owner and the contractor have been paid in full or, if the fact be otherwise, showing the name of each such lienor who has not been paid in full and the amount due or to become due each for labor, services, or materials furnished.

The affidavit must be in substantially the following form:

CONTRACTOR'S FINAL PAYMENT AFFIDAVIT

State of Florida

County of

Before me, the undersigned authority, personally appeared (name of affiant), who, after being first duly sworn, deposes and says of his or her personal knowledge the following:

1. He or she is the (title of affiant), of (name of contractor's business), which does business in the State of Florida, hereinafter referred to as the "Contractor."

2. Contractor, pursuant to a contract with (name of owner), hereinafter referred to as the "Owner," has furnished or caused to be furnished labor, materials, and services for the construction of certain improvements to real property as more particularly set forth in said contract.

3. This affidavit is executed by the Contractor in accordance with section 713.06 of the Florida Statutes for the purposes of obtaining final payment from the Owner in the amount of $.

4. All work to be performed under the contract has been fully completed, and all lienors under the direct contract have been paid in full, except the following listed lienors:

NAME OF LIENOR AMOUNT DUE

Signed, sealed, and delivered this day of , ,

By (name of affiant)
(title of affiant)
(name of contractor's business)

Sworn to and subscribed before me this day of by (name of affiant), who is personally known to me or produced as identification, and did take an oath.

(name of notary public)
Notary Public
My Commission Expires:
(date of expiration of commission)

The contractor shall have no lien or right of action against the owner for labor, services, or materials furnished under the direct contract while in default for not giving the owner the affidavit; however, the negligent inclusion or omission of any information in the affidavit which has not prejudiced the owner does not constitute a default that operates to defeat an otherwise valid lien. The contractor shall execute the affidavit and deliver it to the owner at least 5 days before instituting an action as a prerequisite to the institution of any action to enforce his or her lien under this chapter, even if the final payment has not become due because the contract is terminated for a reason other than completion and regardless of whether the contractor has any lienors working under him or her or not.

2. If the contractor's affidavit required in this subsection recites any outstanding bills for labor, services, or materials, the owner may, after giving the contractor at least 10 days' written notice, pay such bills in full direct to the person or firm to which they are due, if the balance due on a direct contract at the time the affidavit is given is sufficient to pay them and lienors giving notice, and shall deduct the amounts so paid from the balance due the contractor. Lienors listed in said affidavit not giving notice, whose 45-day notice time has not expired, shall be paid in full or pro rata, as appropriate, from any balance then remaining due the contractor; but no lienor whose notice time has expired shall be paid by the owner or by any other person except the person with whom that lienor has a contract.

3. If the balance due is not sufficient to pay in full all lienors listed in the affidavit and entitled to payment from the owner under this part and other lienors giving notice, the owner shall pay no money to

anyone until such time as the contractor has furnished him or her with the difference; however, if the contractor fails to furnish the difference within 10 days from delivery of the affidavit or notice from the owner to the contractor to furnish the affidavit, the owner shall determine the amount due each lienor and shall disburse to them the amounts due from him or her on a direct contract in accordance with the procedure established by subsection (4).

4. The owner shall have the right to rely on the contractor's affidavit given under this paragraph in making the final payment, unless there are lienors giving notice who are not listed in the affidavit. If there are lienors giving notice who are not so listed, the owner may pay such lienors and any persons listed in the affidavit that are entitled to be paid by the owner under subparagraph 2. and shall thereupon be discharged of any further responsibility under the direct contract, except for any balance that may be due to the contractor.

5. The owner shall retain the final payment due under the direct contract that shall not be disbursed until the contractor's affidavit under subparagraph 1. has been furnished to the owner.

6. When final payment has become due to the contractor and the owner fails to withhold as required by subparagraph 5., the property improved shall be subject to the full amount of all valid liens of which the owner has notice at the time the contractor furnishes his or her affidavit.

(e) If the improvement is abandoned before completion, the owner shall determine the amount due each lienor giving notice and shall pay the same in full or prorate in the same manner as provided in subsection (4).

(f) No contractor shall have any right to require the owner to pay any money to him or her under a direct contract if such money cannot be properly paid by the owner to the contractor in accordance with this section.

(g) Except with written consent of the contractor, before paying any money directly to any lienor except the contractor or any laborer, the owner shall give the contractor at least 10 days' written notice of his or her intention to do so, and the amount he or she proposes to pay each lienor.

(h) When the owner has properly retained all sums required in this section to be retained but has otherwise made improper payments, the owner's real property shall be liable to all laborers, subcontractors, sub-subcontractors, and materialmen complying with this chapter only to the extent of the retentions and the improper payments, notwithstanding the other provisions of this subsection. Any money paid by the owner on a direct contract, the payment of which is proved to have caused no detriment to any certain lienor, shall be held properly paid as to the lienor, and if any of the money shall be held not properly paid as to any other lienors, the entire benefit of its being held not properly paid as to them shall go to the lienors.

(4)(a) In determining the amounts for which liens between lienors claiming under a direct contract shall be paid by the owner or allowed by the court within the total amount fixed by the direct contract and under the provisions of this section, the owner or court shall pay or allow such liens in the following order:

1. Liens of all laborers.
2. Liens of all persons other than the contractor.
3. Lien of the contractor.

(b) Should the total amount for which liens under such direct contract may be allowed be less than the total amount of liens under such contract in all classes above mentioned, all liens in a class shall be allowed for their full amounts before any liens shall be allowed to any subsequent class. Should the amount applicable to the liens of any single class be insufficient to permit all liens within that class to be allowed for their full amounts, each lien shall be allowed for its pro rata share of the total amount applicable to liens of that class; but if the same labor, services, or materials shall be covered by liens of more than one class, such labor, services, or materials shall be allowed only in the earliest class by which they shall be covered; and also if

the same labor, services, or materials shall be covered by liens of two or more lienors of the same class, such labor, services, or materials shall be allowed only in the lien of the lienor farthest removed from the contractor. This section shall not be construed to affect the priority of liens derived under separate direct contracts.

History.—s. 1, ch. 63-135; ss. 4, 5, ch. 65-456; s. 35, ch. 67-254; s. 1, ch. 75-227; s. 5, ch. 77-353; s. 4, ch. 80-97; s. 3, ch. 87-74; s. 4, ch. 90-109; s. 1, ch. 93-99; s. 318, ch. 94-119; s. 229, ch. 94-218; s. 2, ch. 96-383; s. 1764, ch. 97-102; s. 2, ch. 97-219; s. 3, ch. 98-135; s. 3, ch. 99-386; ss. 2, 3, ch. 2003-177.

Note.—Former s. 84.061.

713.07 Priority of liens.—

(1) Liens under ss. 713.03 and 713.04 shall attach at the time of recordation of the claim of lien and shall take priority as of that time.

(2) Liens under ss. 713.05 and 713.06 shall attach and take priority as of the time of recordation of the notice of commencement, but in the event a notice of commencement is not filed, then such liens shall attach and take priority as of the time the claim of lien is recorded.

(3) All such liens shall have priority over any conveyance, encumbrance or demand not recorded against the real property prior to the time such lien attached as provided herein, but any conveyance, encumbrance or demand recorded prior to the time such lien attaches and any proceeds thereof, regardless of when disbursed, shall have priority over such liens.

(4) If construction ceases or the direct contract is terminated before completion and the owner desires to recommence construction, he or she may pay all lienors in full or pro rata in accordance with s. 713.06(4) prior to recommencement in which event all liens for the recommenced construction shall take priority from such recommencement; or the owner may record an affidavit in the clerk's office stating his or her intention to recommence construction and that all lienors giving notice have been paid in full except those listed therein as not having been so paid in which event 30 days after such recording, the rights of any person acquiring any interest, lien, or encumbrance on said property or of any lienor on the recommenced construction shall be paramount to any lien on the prior construction unless such prior lienor records a claim of lien within said 30-day period. A copy of said affidavit shall be served on each lienor named therein. Before recommencing, the owner shall record and post a notice of commencement for the recommenced construction, as provided in s. 713.13.

History.—s. 1, ch. 63-135; s. 6, ch. 65-456; s. 35, ch. 67-254; s. 804, ch. 97-102; s. 6, ch. 2007-221.

Note.—Former s. 84.071.

713.08 Claim of lien.—

(1) For the purpose of perfecting her or his lien under this part, every lienor, including laborers and persons in privity, shall record a claim of lien which shall state:

(a) The name of the lienor and the address where notices or process under this part may be served on the lienor.

(b) The name of the person with whom the lienor contracted or by whom she or he was employed.

(c) The labor, services, or materials furnished and the contract price or value thereof. Materials specially fabricated at a place other than the site of the improvement for incorporation in the improvement but not so incorporated and the contract price or value thereof shall be separately stated in the claim of lien.

(d) A description of the real property sufficient for identification.

(e) The name of the owner.

(f) The time when the first and the last item of labor or service or materials was furnished.

(g) The amount unpaid the lienor for such labor or services or materials and for unpaid finance charges due under the lienor's contract.

(h) If the lien is claimed by a person not in privity with the owner, the date and method of service of the notice to owner. If the lien is claimed by a person not in privity with the contractor or subcontractor, the date and method of service of the copy of the notice on the contractor or subcontractor.

(2) The claim of lien may be prepared by the lienor or the lienor's employee or attorney and shall be signed and sworn to or affirmed by the lienor or the lienor's agent acquainted with the facts stated therein.

(3) The claim of lien shall be sufficient if it is in substantially the following form, and includes the following warning:

WARNING!

THIS LEGAL DOCUMENT REFLECTS THAT A CONSTRUCTION LIEN HAS BEEN PLACED ON THE REAL PROPERTY LISTED HEREIN. UNLESS THE OWNER OF SUCH PROPERTY TAKES ACTION TO SHORTEN THE TIME PERIOD, THIS LIEN MAY REMAIN VALID FOR ONE YEAR FROM THE DATE OF RECORDING, AND SHALL EXPIRE AND BECOME NULL AND VOID THEREAFTER UNLESS LEGAL PROCEEDINGS HAVE BEEN COMMENCED TO FORECLOSE OR TO DISCHARGE THIS LIEN.

CLAIM OF LIEN

State of

County of

Before me, the undersigned notary public, personally appeared , who was duly sworn and says that she or he is (the lienor herein) (the agent of the lienor herein), whose address is ; and that in accordance with a contract with , lienor furnished labor, services, or materials consisting of on the following described real property in County, Florida:

(Legal description of real property)

owned by of a total value of $, of which there remains unpaid $, and furnished the first of the items on , (year), and the last of the items on , (year); and (if the lien is claimed by one not in privity with the owner) that the lienor served her or his notice to owner on , (year), by ; and (if required) that the lienor served copies of the notice on the contractor on , (year), by and on the subcontractor, , on , (year), by .

(Signature)

Sworn to (or affirmed) and subscribed before me this day of , (year), by (name of person making statement).

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

However, the negligent inclusion or omission of any information in the claim of lien which has not prejudiced the owner does not constitute a default that operates to defeat an otherwise valid lien.

(4)(a) The omission of any of the foregoing details or errors in such claim of lien shall not, within the discretion of the trial court, prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error.

(b) Any claim of lien recorded as provided in this part may be amended at any time during the period allowed for recording such claim of lien, provided that such amendment shall not cause any person to suffer any detriment by having acted in good faith in reliance upon such claim of lien as originally recorded. Any amendment of the claim of lien shall be recorded in the same manner as provided for recording the original claim of lien.

(c) The claim of lien shall be served on the owner. Failure to serve any claim of lien in the manner provided in s. 713.18 before recording or within 15 days after recording shall render the claim of lien voidable to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on the service.

(5) The claim of lien may be recorded at any time during the progress of the work or thereafter but not later than 90 days after the final furnishing of the labor or services or materials by the lienor. However, if the original contract is terminated under s. 713.07(4), a claim for a lien attaching prior to such termination may not be recorded after 90 days following the date of such termination or 90 days after the final furnishing of labor, services, or materials by the lienor, whichever occurs first. The claim of lien shall be recorded in the clerk's office. If such real property is situated in two or more counties, the claim of lien shall be recorded in the clerk's office in each of such counties. The recording of the claim of lien shall be constructive notice to all persons of the contents and effect of such claim. The validity of the lien and the right to record a claim therefor shall not be affected by the insolvency, bankruptcy, or death of the owner before the claim of lien is recorded.

History.—s. 1, ch. 63-135; s. 7, ch. 65-456; s. 35, ch. 67-254; s. 6, ch. 77-353; s. 5, ch. 80-97; s. 4, ch. 92-286; s. 3, ch. 96-383; s. 1765, ch. 97-102; s. 13, ch. 98-246; s. 4, ch. 99-386; s. 4, ch. 2003-177; s. 8, ch. 2005-227; s. 7, ch. 2007-221.

Note.—Former s. 84.081.

713.09 Single claim of lien.—A lienor is required to record only one claim of lien covering his or her entire demand against the real property when the amount demanded is for labor or services or material furnished for more than one improvement under the same direct contract. The single claim of lien is sufficient even though the improvement is for one or more improvements located on separate lots, parcels, or tracts of land. If materials to be used on one or more improvements on separate lots, parcels, or tracts of land under one direct contract are delivered by a lienor to a place designated by the person with whom the materialman contracted, other than the site of the improvement, the delivery to the place designated is prima facie evidence of delivery to the site of the improvement and incorporation in the improvement. The single claim of lien may be limited to a part of multiple lots, parcels, or tracts of land and their improvements or may cover all of the lots, parcels, or tracts of land and improvements. In each claim of lien under this section, the owner under the direct contract must be the same person for all lots, parcels, or tracts of land against which a single claim of lien is recorded.

History.—s. 1, ch. 63-135; s. 8, ch. 65-456; s. 35, ch. 67-254; s. 6, ch. 80-97; s. 5, ch. 90-109; s. 805, ch. 97-102.

Note.—Former s. 84.091.

713.10 Extent of liens.—

(1) Except as provided in s. 713.12, a lien under this part shall extend to, and only to, the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement or is thereafter acquired in the real property. When an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor.

(2)(a) When the lease expressly provides that the interest of the lessor shall not be subject to liens for improvements made by the lessee, the lessee shall notify the contractor making any such improvements of such provision or provisions in the lease, and the knowing or willful failure of the lessee to provide such notice to the contractor shall render the contract between the lessee and the contractor voidable at the option of the contractor.

(b) The interest of the lessor is not subject to liens for improvements made by the lessee when:

1. The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of the county where the premises are

located before the recording of a notice of commencement for improvements to the premises and the terms of the lease expressly prohibit such liability; or

2. The terms of the lease expressly prohibit such liability, and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises, and the notice includes the following:

a. The name of the lessor.

b. The legal description of the parcel of land to which the notice applies.

c. The specific language contained in the various leases prohibiting such liability.

d. A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.

3. The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.

A notice that is consistent with subparagraph 2. effectively prohibits liens for improvements made by a lessee even if other leases for premises on the parcel do not expressly prohibit liens or if provisions of each lease restricting the application of liens are not identical.

(3) Any contractor or lienor under contract to furnish labor, services, or materials for improvements being made by a lessee may serve written demand on the lessor for a copy of the provision in the lease prohibiting liability for improvements made by the lessee, which copy shall be verified under s. 92.525. The demand must identify the lessee and the premises being improved and must be in a document that is separate from the notice to the owner as provided in s. 713.06(2). The interest of any lessor who does not serve a verified copy of the lease provision within 30 days after demand, or who serves a false or fraudulent copy, is subject to a lien under this part by the contractor or lienor who made the demand if the contractor or lienor has otherwise complied with this part and did not have actual notice that the interest of the lessor was not subject to a lien for improvements made by the lessee. The written demand must include a warning in conspicuous type in substantially the following form:

WARNING

YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 1, ch. 85-103; s. 1, ch. 92-148; s. 806, ch. 97-102; s. 1, ch. 2011-212; s. 4, ch. 2012-211.

Note.—Former s. 84.101.

713.11 Liens for improving land in which the contracting party has no interest.—When the person contracting for improving real property has no interest as owner in the land, no lien shall attach to the land, except as provided in s. 713.12, but if removal of such improvement from the land is practicable, the lien of a lienor shall attach to the improvement on which he or she has performed labor or services or for which he or she has furnished materials. The court, in the enforcement of such lien, may order such improvement to be separately sold and the purchaser may remove it within such reasonable time as the court may fix. The purchase price for such improvement shall be paid into court. The owner of the land upon which the improvement was made may demand that the land be restored substantially to its condition before the improvement was commenced, in which case the court shall order its restoration and the reasonable charge therefor shall be first paid out of such purchase price and the remainder shall be paid to lienors and other

encumbrancers in accordance with their respective rights.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 807, ch. 97-102.

Note.—Former s. 84.111.

713.12 Liens for improving real property under contract with husband or wife on property of the other or of both.—When the contract for improving real property is made with a husband or wife who is not separated and living apart from his or her spouse and the property is owned by the other or by both, the spouse who contracts shall be deemed to be the agent of the other to the extent of subjecting the right, title, or interest of the other in said property to liens under this part unless such other shall, within 10 days after learning of such contract, give the contractor and record in the clerk's office, notice of his or her objection thereto.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254.

Note.—Former s. 84.121.

713.13 Notice of commencement.—

(1)(a) Except for an improvement that is exempt pursuant to s. 713.02(5), an owner or the owner's authorized agent before actually commencing to improve any real property, or recommencing completion of any improvement after default or abandonment, whether or not a project has a payment bond complying with s. 713.23, shall record a notice of commencement in the clerk's office and forthwith post either a certified copy thereof or a notarized statement that the notice of commencement has been filed for recording along with a copy thereof. The notice of commencement shall contain the following information:

1. A description sufficient for identification of the real property to be improved. The description should include the legal description of the property and also should include the street address and tax folio number of the property if available or, if there is no street address available, such additional information as will describe the physical location of the real property to be improved.

2. A general description of the improvement.

3. The name and address of the owner, the owner's interest in the site of the improvement, and the name and address of the fee simple titleholder, if other than such owner. A lessee who contracts for the improvements is an owner as defined under s. 713.01(23) and must be listed as the owner together with a statement that the ownership interest is a leasehold interest.

4. The name and address of the contractor.

5. The name and address of the surety on the payment bond under s. 713.23, if any, and the amount of such bond.

6. The name and address of any person making a loan for the construction of the improvements.

7. The name and address within the state of a person other than himself or herself who may be designated by the owner as the person upon whom notices or other documents may be served under this part; and service upon the person so designated constitutes service upon the owner.

(b) The owner, at his or her option, may designate a person in addition to himself or herself to receive a copy of the lienor's notice as provided in s. 713.06(2)(b), and if he or she does so, the name and address of such person must be included in the notice of commencement.

(c) If the contract between the owner and a contractor named in the notice of commencement expresses a period of time for completion for the construction of the improvement greater than 1 year, the notice of commencement must state that it is effective for a period of 1 year plus any additional period of time. Any payments made by the owner after the expiration of the notice of commencement are considered improper payments.

(d) A notice of commencement must be in substantially the following form:

Permit No. Tax Folio No.

NOTICE OF COMMENCEMENT

State of
County of

The undersigned hereby gives notice that improvement will be made to certain real property, and in accordance with Chapter 713, Florida Statutes, the following information is provided in this Notice of Commencement.

1. Description of property: (legal description of the property, and street address if available) .
2. General description of improvement: .
3. Owner information or Lessee information if the Lessee contracted for the improvement:
a. Name and address: .
b. Interest in property: .
c. Name and address of fee simple titleholder (if different from Owner listed above): .
4.a. Contractor: (name and address) .
b. Contractor's phone number: .
5. Surety (if applicable, a copy of the payment bond is attached):
a. Name and address: .
b. Phone number: .
c. Amount of bond: $.
6.a. Lender: (name and address) .
b. Lender's phone number: .
7. Persons within the State of Florida designated by Owner upon whom notices or other documents may be served as provided by Section 713.13(1)(a)7., Florida Statutes:
a. Name and address: .
b. Phone numbers of designated persons: .
8.a. In addition to himself or herself, Owner designates of to receive a copy of the Lienor's Notice as provided in Section 713.13(1)(b), Florida Statutes.
b. Phone number of person or entity designated by owner: .
9. Expiration date of notice of commencement (the expiration date will be 1 year from the date of recording unless a different date is specified) .

WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT.

(Signature of Owner or Lessee, or Owner's or Lessee's Authorized Officer/Director/Partner/Manager)

(Signatory's Title/Office)

The foregoing instrument was acknowledged before me this day of , (year) , by (name of person) as (type of authority, . . . e.g. officer, trustee, attorney in fact) for (name of party on behalf of whom instrument was executed) .

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(e) A copy of any payment bond must be attached at the time of recordation of the notice of commencement. The failure to attach a copy of the bond to the notice of commencement when the notice is recorded negates the exemption provided in s. 713.02(6). However, if a payment bond under s. 713.23 exists but was not attached at the time of recordation of the notice of commencement, the bond may be used to transfer any recorded lien of a lienor except that of the contractor by the recordation and service of a notice of bond pursuant to s. 713.23(2). The notice requirements of s. 713.23 apply to any claim against the bond; however, the time limits for serving any required notices shall, at the option of the lienor, be calculated from the dates specified in s. 713.23 or the date the notice of bond is served on the lienor.

(f) The giving of a notice of commencement is effective upon the filing of the notice in the clerk's office.

(g) The owner must sign the notice of commencement and no one else may be permitted to sign in his or her stead.

(2) If the improvement described in the notice of commencement is not actually commenced within 90 days after the recording thereof, such notice is void and of no further effect.

(3) The recording of a notice of commencement does not constitute a lien, cloud, or encumbrance on real property, but gives constructive notice that claims of lien under this part may be recorded and may take priority as provided in s. 713.07. The posting of a copy does not constitute a lien, cloud, or encumbrance on real property, nor actual or constructive notice of any of them.

(4) This section does not apply to an owner who is constructing improvements described in s. 713.04.

(5)(a) A notice of commencement that is recorded within the effective period may be amended to extend the effective period, change erroneous information in the original notice, or add information that was omitted from the original notice. However, in order to change contractors, a new notice of commencement or notice of recommencement must be executed and recorded.

(b) The amended notice must identify the official records book and page where the original notice of commencement is recorded, and a copy of the amended notice must be served by the owner upon the contractor and each lienor who serves notice before or within 30 days after the date the amended notice is recorded.

(6) Unless otherwise provided in the notice of commencement or a new or amended notice of commencement, a notice of commencement is not effectual in law or equity against a conveyance, transfer, or mortgage of or lien on the real property described in the notice, or against creditors or subsequent purchasers for a valuable consideration, after 1 year after the date of recording the notice of commencement.

(7) A lender must, prior to the disbursement of any construction funds to the contractor, record the notice of commencement in the clerk's office as required by this section; however, the lender is not required to post a certified copy of the notice at the construction site. The posting of the notice at the construction site remains the owner's obligation. The failure of a lender to record the notice of commencement as required by this subsection renders the lender liable to the owner for all damages sustained by the owner as a result of the failure. Whenever a lender is required to record a notice of commencement, the lender shall designate the lender, in addition to others, to receive copies of notices to owner. This subsection does not give any person other than the owner a claim or right of action against a lender for failure to record a notice of commencement.

History.—s. 1, ch. 63-135; s. 9, ch. 65-456; s. 35, ch. 67-254; s. 14, ch. 77-353; s. 7, ch. 80-97; s. 4, ch. 88-397; s. 6, ch. 90-109;

s. 2, ch. 91-102; s. 4, ch. 96-383; s. 1766, ch. 97-102; s. 14, ch. 98-246; s. 6, ch. 2001-211; s. 9, ch. 2005-227; s. 8, ch. 2007-221; s. 2, ch. 2011-212; s. 5, ch. 2012-211.

Note.—Former s. 84.131.

713.132 Notice of termination.—

(1) An owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination that contains:

(a) The same information as the notice of commencement;

(b) The recording office document book and page reference numbers and date of the notice of commencement;

(c) A statement of the date as of which the notice of commencement is terminated, which date may not be earlier than 30 days after the notice of termination is recorded;

(d) A statement specifying that the notice applies to all the real property subject to the notice of commencement or specifying the portion of such real property to which it applies;

(e) A statement that all lienors have been paid in full; and

(f) A statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner. The owner is not required to serve a copy of the notice of termination on any lienor who has executed a waiver and release of lien upon final payment in accordance with s. 713.20.

(2) An owner has the right to rely on a contractor's affidavit given under s. 713.06(3)(d), except with respect to lienors who have already given notice, in connection with the execution, swearing to, and recording of a notice of termination. However, the notice of termination must be accompanied by the contractor's affidavit.

(3) An owner may not record a notice of termination except after completion of construction, or after construction ceases before completion and all lienors have been paid in full or pro rata in accordance with s. 713.06(4). If an owner or a contractor, by fraud or collusion, knowingly makes any fraudulent statement or affidavit in a notice of termination or any accompanying affidavit, the owner and the contractor, or either of them, as the case may be, is liable to any lienor who suffers damages as a result of the filing of the fraudulent notice of termination; and any such lienor has a right of action for damages occasioned thereby.

(4) A notice of termination is effective to terminate the notice of commencement at the later of 30 days after recording of the notice of termination or the date stated in the notice of termination as the date on which the notice of commencement is terminated, if the notice of termination has been served pursuant to paragraph (1)(f) on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner.

History.—s. 7, ch. 90-109; s. 5, ch. 92-286; s. 3, ch. 97-219; s. 4, ch. 98-135; s. 7, ch. 2012-211.

713.135 Notice of commencement and applicability of lien.—

(1) When any person applies for a building permit, the authority issuing such permit shall:

(a) Print on the face of each permit card in no less than 14-point, capitalized, boldfaced type: "WARNING TO OWNER: YOUR FAILURE TO RECORD A NOTICE OF COMMENCEMENT MAY RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE RECORDING YOUR NOTICE OF COMMENCEMENT."

(b) Provide the applicant and the owner of the real property upon which improvements are to be constructed with a printed statement stating that the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the Construction Lien Law. The Department of Business and Professional Regulation shall furnish, for distribution, the statement described in

this paragraph, and the statement must be a summary of the Construction Lien Law and must include an explanation of the provisions of the Construction Lien Law relating to the recording, and the posting of copies, of notices of commencement and a statement encouraging the owner to record a notice of commencement and post a copy of the notice of commencement in accordance with s. 713.13. The statement must also contain an explanation of the owner's rights if a lienor fails to furnish the owner with a notice as provided in s. 713.06(2) and an explanation of the owner's rights as provided in s. 713.22. The authority that issues the building permit must obtain from the Department of Business and Professional Regulation the statement required by this paragraph and must mail, deliver by electronic mail or other electronic format or facsimile, or personally deliver that statement to the owner or, in a case in which the owner is required to personally appear to obtain the permit, provide that statement to any owner making improvements to real property consisting of a single or multiple family dwelling up to and including four units. However, the failure by the authorities to provide the summary does not subject the issuing authority to liability.

(c) In addition to providing the owner with the statement as required by paragraph (b), inform each applicant who is not the person whose right, title, and interest is subject to attachment that, as a condition to the issuance of a building permit, the applicant must promise in good faith that the statement will be delivered to the person whose property is subject to attachment.

(d) Furnish to the applicant two or more copies of a form of notice of commencement conforming with s. 713.13. If the direct contract is greater than $2,500, the applicant shall file with the issuing authority prior to the first inspection either a certified copy of the recorded notice of commencement or a notarized statement that the notice of commencement has been filed for recording, along with a copy thereof. In the absence of the filing of a certified copy of the recorded notice of commencement, the issuing authority or a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means such certified copy with the issuing authority. The certified copy of the notice of commencement must contain the name and address of the owner, the name and address of the contractor, and the location or address of the property being improved. The issuing authority shall verify that the name and address of the owner, the name of the contractor, and the location or address of the property being improved which is contained in the certified copy of the notice of commencement is consistent with the information in the building permit application. The issuing authority shall provide the recording information on the certified copy of the recorded notice of commencement to any person upon request. This subsection does not require the recording of a notice of commencement prior to the issuance of a building permit. If a local government requires a separate permit or inspection for installation of temporary electrical service or other temporary utility service, land clearing, or other preliminary site work, such permits may be issued and such inspections may be conducted without providing the issuing authority with a certified copy of a recorded notice of commencement or a notarized statement regarding a recorded notice of commencement. This subsection does not apply to a direct contract to repair or replace an existing heating or air-conditioning system in an amount less than $7,500.

(e) Not require that a notice of commencement be recorded as a condition of the application for, or processing or issuance of, a building permit. However, this paragraph does not modify or waive the inspection requirements set forth in this subsection.

(2) An issuing authority under subsection (1) is not liable in any civil action for the failure of the person whose property is subject to attachment to receive or to be delivered a printed statement stating that the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the Construction Lien Law.

(3) An issuing authority under subsection (1) is not liable in any civil action for the failure to verify that a

certified copy of the recorded notice of commencement has been filed in accordance with this section.

(4) The several boards of county commissioners, municipal councils, or other similar bodies may by ordinance or resolution establish reasonable fees for furnishing copies of the forms and the printed statement provided in paragraphs (1)(b) and (d) in an amount not to exceed $5 to be paid by the applicant for each permit in addition to all other costs of the permit; however, no forms or statement need be furnished, mailed, or otherwise provided to, nor may such additional fee be obtained from, applicants for permits in those cases in which the owner of a legal or equitable interest (including that of ownership of stock of a corporate landowner) of the real property to be improved is engaged in the business of construction of buildings for sale to others and intends to make the improvements authorized by the permit on the property and upon completion will offer the improved real property for sale.

(5) In addition to any other information required by the authority issuing the permit, each building permit application must contain:

(a) The name and address of the owner of the real property;

(b) The name and address of the contractor;

(c) A description sufficient to identify the real property to be improved; and

(d) The number or identifying symbol assigned to the building permit by the issuing authority, which number or symbol must be affixed to the application by the issuing authority.

(6)(a) In addition to any other information required by the authority issuing the permit, the building permit application must be in substantially the following form:

Tax Folio No.

BUILDING PERMIT APPLICATION

Owner's Name
Owner's Address
Fee Simple Titleholder's Name (If other than owner)
Fee Simple Titleholder's Address (If other than owner)
City
State Zip
Contractor's Name
Contractor's Address
City
State Zip
Job Name
Job Address
City County
Legal Description
Bonding Company
Bonding Company Address
City State
Architect/Engineer's Name
Architect/Engineer's Address
Mortgage Lender's Name
Mortgage Lender's Address

Application is hereby made to obtain a permit to do the work and installations as indicated. I certify that

no work or installation has commenced prior to the issuance of a permit and that all work will be performed to meet the standards of all laws regulating construction in this jurisdiction. I understand that a separate permit must be secured for ELECTRICAL WORK, PLUMBING, SIGNS, WELLS, POOLS, FURNACES, BOILERS, HEATERS, TANKS, and AIR CONDITIONERS, etc.

OWNER'S AFFIDAVIT: I certify that all the foregoing information is accurate and that all work will be done in compliance with all applicable laws regulating construction and zoning.

WARNING TO OWNER: YOUR FAILURE TO RECORD A NOTICE OF COMMENCEMENT MAY RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION.

IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT.

(Signature of Owner or Agent)

(including contractor)

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed) and subscribed before me this day of , (year), by (name of person making statement).

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(Signature of Contractor)

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed) and subscribed before me this day of , (year), by (name of person making statement).

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(Certificate of Competency Holder)

Contractor's State Certification or Registration No.

Contractor's Certificate of Competency No.

APPLICATION APPROVED BY
Permit Officer

(b)1. Consistent with the requirements of paragraph (a), an authority responsible for issuing building permits under this section may accept a building permit application in an electronic format, as prescribed by

the authority. Building permit applications submitted to the authority electronically must contain the following additional statement in lieu of the requirement in paragraph (a) that a signed, sworn, and notarized signature of the owner or agent and the contractor be part of the owner's affidavit:

OWNER'S ELECTRONIC SUBMISSION STATEMENT: Under penalty of perjury, I declare that all the information contained in this building permit application is true and correct.

2. For purposes of implementing a "United States Department of Energy SunShot Initiative: Rooftop Solar Challenge" grant and the participation of county and municipal governments, including local permitting agencies under the jurisdiction of such county and municipal governments, an owner or contractor shall not be required to personally appear and provide a notarized signature when filing a building permit application, if such building permit application will be electronically submitted to the permitting authority, the application relates to a solar project, and the owner or contractor certifies the application, consistent with this paragraph, using the permitting authority's electronic confirmation system. For purposes of this subsection, a "solar project" means installing, uninstalling, or replacing solar panels on single-family residential property, multifamily residential property, or commercial property.

(c) An authority responsible for issuing building permit applications which accepts building permit applications in an electronic format shall provide public Internet access to the electronic building permit applications in a searchable format.

(d) An authority responsible for issuing building permits which accepts building permit applications in an electronic format for solar projects, as defined in subparagraph (b)2., is not liable in any civil action for any inaccurate information submitted by an owner or contractor using the authority's electronic confirmation system.

(7) This section applies to every municipality and county in the state which now has or hereafter may have a system of issuing building permits for the construction of improvements or for the alteration or repair of improvements on or to real property located within the geographic limits of the issuing authority.

History.—ss. 1, 2, 3, ch. 67-185; s. 2, ch. 78-397; s. 1, ch. 84-26; s. 1, ch. 86-247; s. 4, ch. 87-74; s. 8, ch. 90-109; s. 3, ch. 91-102; s. 2, ch. 93-99; s. 230, ch. 94-218; s. 5, ch. 96-383; s. 4, ch. 97-219; s. 15, ch. 98-246; s. 71, ch. 99-5; s. 5, ch. 99-386; s. 5, ch. 2003-177; s. 2, ch. 2006-187; s. 9, ch. 2007-221; s. 18, ch. 2012-13.

713.14 Application of money to materials account.—

(1) Any owner, contractor, subcontractor, or sub-subcontractor, in making any payment under, or properly applicable to, any contract to one with whom she or he has a running account, or with whom she or he has more than one contract, or to whom she or he is otherwise indebted, shall designate the contract under which the payment is made or the items of account to which it is to be applied. If she or he shall fail to do so or shall make a false designation, she or he shall be liable to anyone suffering a loss in consequence for the amount of the loss.

(2) When a payment for materials is made to a subcontractor, sub-subcontractor, or materialman, the subcontractor, sub-subcontractor, or materialman shall demand of the person making the payment a designation of the account and the items of account to which the payment is to apply. In any case in which a lien is claimed for materials furnished by a subcontractor, sub-subcontractor, or materialman, it is a defense to the claim, to the extent of the payment made, to prove that a payment made by the owner to the contractor for the materials has been paid over to the subcontractor, sub-subcontractor, or materialman, and to prove also that when such payment was received by such subcontractor, sub-subcontractor, or materialman she or he did not demand a designation of the account and of the items of account to which the payment was to be applied or, receiving a designation of its application to the account for the materials, she or he failed to apply the payment in accordance therewith. This subsection is cumulative to any other

defenses available to the person paying the materialman, subcontractor, or sub-subcontractor.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 7, ch. 77-353; s. 9, ch. 90-109; s. 808, ch. 97-102.

Note.—Former s. 84.141.

713.15 Repossession of materials not used.—If for any reason the completion of an improvement is abandoned or though the improvement is completed, materials delivered are not used therefor, a person who has delivered materials for the improvement which have not been incorporated therein and for which he or she has not received payment may peaceably repossess and remove such materials or replevy the same and thereupon he or she shall have no lien on the real property or improvements and no right against any persons for the price thereof, but shall have the same rights in regard to the materials as if he or she had never parted with their possession. This right to repossess and remove or replevy the materials shall not be affected by their sale, encumbrance, attachment, or transfer from the site of improvement, except that if the materials have been so transferred, the right to repossess or replevy them shall not be effective as against a purchaser or encumbrancer thereof in good faith whose interest therein is acquired after such transfer from the site of the improvement or as against a creditor attaching after such transfer. The right of repossession and removal given by this section shall extend only to materials whose purchase price does not exceed the amount remaining due to the person repossessing but where materials have been partly paid for, the person delivering them may repossess them as allowed in this section on refunding the part of the purchase price which has been paid.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 809, ch. 97-102.

Note.—Former s. 84.151.

713.16 Demand for copy of contract and statements of account; form.—

(1) A copy of the contract of a lienor or owner and a statement of the amount due or to become due if fixed or ascertainable thereon must be furnished by any party thereto, upon written demand of an owner or a lienor contracting with or employed by the other party to such contract. If the owner or lienor refuses or neglects to furnish such copy of the contract or such statement, or willfully and falsely states the amount due or to become due if fixed or ascertainable under such contract, any person who suffers any detriment thereby has a cause of action against the person refusing or neglecting to furnish the same or willfully and falsely stating the amount due or to become due for his or her damages sustained thereby. The information contained in such copy or statement furnished pursuant to such written demand is binding upon the owner or lienor furnishing it unless actual notice of any modification is given to the person demanding the copy or statement before such person acts in good faith in reliance on it. The person demanding such documents must pay for the reproduction thereof; and, if such person fails or refuses to do so, he or she is entitled only to inspect such documents at reasonable times and places.

(2) The owner may serve in writing a demand of any lienor for a written statement under oath of his or her account showing the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, as of the date of the statement by the lienor. Any such demand to a lienor must be served on the lienor at the address and to the attention of any person who is designated to receive the demand in the notice to owner served by such lienor and must include a description of the property and the names of the owner, the contractor, and the lienor's customer, as set forth in the lienor's notice to owner. The failure or refusal to furnish the statement does not deprive the lienor of his or her lien if the demand is not served at the address of the lienor or directed to the attention of the person designated to receive the demand in the notice to owner. The failure or refusal to furnish the statement under oath within 30 days after the demand, or the furnishing of a false or fraudulent statement, deprives the person so failing or refusing to furnish such statement of his or her lien. If the owner serves more than one demand for

statement of account on a lienor and none of the information regarding the account has changed since the lienor's last response to a demand, the failure or refusal to furnish such statement does not deprive the lienor of his or her lien. The negligent inclusion or omission of any information deprives the person of his or her lien to the extent the owner can demonstrate prejudice from such act or omission by the lienor. The failure to furnish a response to a demand for statement of account does not affect the validity of any claim of lien being enforced through a foreclosure case filed before the date the demand for statement is received by the lienor.

(3) A request for sworn statement of account must be in substantially the following form:

REQUEST FOR SWORN STATEMENT OF ACCOUNT

WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT, SIGNED UNDER OATH, WITHIN 30 DAYS OR THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN THE LOSS OF YOUR LIEN.

To: (Lienor's name and address)

The undersigned hereby demands a written statement under oath of his or her account showing the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, as of the date of the statement for the improvement of real property identified as (property description).

(name of contractor)

(name of the lienor's customer, as set forth in the lienor's Notice to Owner, if such notice has been served)

(signature and address of owner)
(date of request for sworn statement of account)

(4) When a contractor has furnished a payment bond pursuant to s. 713.23, he or she may, when an owner makes any payment to the contractor or directly to a lienor, serve a written demand on any other lienor for a written statement under oath of his or her account showing the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, as of the date of the statement by the lienor. Any such demand to a lienor must be served on the lienor at the address and to the attention of any person who is designated to receive the demand in the notice to contractor served by such lienor. The demand must include a description of the property and the names of the owner, the contractor, and the lienor's customer, as set forth in the lienor's notice to contractor. The failure or refusal to furnish the statement does not deprive the lienor of his or her rights under the bond if the demand is not served at the address of the lienor or directed to the attention of the person designated to receive the demand in the notice to contractor. The failure to furnish the statement within 30 days after the demand, or the furnishing of a false or fraudulent statement, deprives the person who fails to furnish the statement, or who furnishes the false or fraudulent statement, of his or her rights under the bond. If the contractor serves more than one demand for statement of account on a lienor and none of the information regarding the account has changed since the lienor's last response to a demand, the failure or refusal to furnish such statement does not deprive the lienor of his or her rights under the bond. The negligent inclusion or omission of any information deprives the person of his or her rights under the bond to the extent the contractor can demonstrate prejudice from such act or omission by the lienor. The failure to furnish a response to a demand for statement of account does not affect the validity of any claim on the bond being enforced in a lawsuit filed prior to the date the

demand for statement of account is received by the lienor.

(5)(a) Any lienor who is perfecting a claim of lien may serve with the claim of lien or thereafter a written demand on the owner for a written statement under oath showing:

1. The amount of the direct contract under which the lien was recorded;

2. The dates and amounts paid or to be paid by or on behalf of the owner for all improvements described in the direct contract;

3. The reasonable estimated costs of completing the direct contract under which the lien was claimed pursuant to the scope of the direct contract; and

4. If known, the actual cost of completion.

(b) Any owner who does not provide the statement within 30 days after demand, or who provides a false or fraudulent statement, is not a prevailing party for purposes of an award of attorney fees under s. 713.29. The written demand must include the following warning in conspicuous type in substantially the following form:

WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT WITHIN 30 DAYS OR THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN THE LOSS OF YOUR RIGHT TO RECOVER ATTORNEY FEES IN ANY ACTION TO ENFORCE THE CLAIM OF LIEN OF THE PERSON REQUESTING THIS STATEMENT.

(6) Any written demand served on the owner must include a description of the property and the names of the contractor and the lienor's customer, as set forth in the lienor's notice to owner.

(7) For purposes of this section, the term "information" means the nature and quantity of the labor, services, and materials furnished or to be furnished by a lienor and the amount paid, the amount due, and the amount to become due on the lienor's account.

History.—s. 1, ch. 63-135; s. 10, ch. 65-456; s. 35, ch. 67-254; s. 8, ch. 77-353; s. 10, ch. 90-109; s. 6, ch. 92-286; s. 319, ch. 94-119; s. 6, ch. 96-383; s. 1767, ch. 97-102; s. 6, ch. 99-386; s. 10, ch. 2007-221; s. 8, ch. 2012-211.

Note.—Former s. 84.161.

713.165 Request for list of subcontractors and suppliers.—

(1) An owner of real property may request from the contractor a list of all subcontractors and suppliers who have any contract with the contractor to furnish any material or to perform any service for the contractor with respect to the owner's real property or improvement to the real property. The request must be in writing and delivered by registered or certified mail to the address of the contractor shown in the contract or the recorded notice of commencement.

(2) The contractor must within 10 days after receipt of the property owner's written request, furnish to the property owner or the property owner's agent a list of the subcontractors and suppliers who have a contract with the contractor as of the date the request is received by the contractor. If the contractor fails to furnish the list, the contractor thereby forfeits the contractor's right to assert a lien against the owner's property to the extent the owner is prejudiced by the contractor's failure to furnish the list or by any omissions from the list.

(3) A list furnished under this section shall not constitute a notice to owner.

History.—s. 7, ch. 95-240.

713.17 Materials not attachable for debts of purchaser.—Whenever materials have been furnished to improve real property and payment therefor has not been made or waived, such materials shall not be subject to attachment, execution, or other legal process to enforce any debt due by the purchaser of such materials, except a debt due for the purchase price thereof, so long as in good faith the same are about to be applied to improve the real property; but if the owner has made payment for materials furnished and the materialman has not received payment therefor, such materials shall not be subject to attachment,

execution, or other legal process to enforce the debt due for the purchase price.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254.

Note.—Former s. 84.171.

713.18 Manner of serving notices and other instruments.—

(1) Service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required under this part, or copies thereof when so permitted or required, unless otherwise specifically provided in this part, must be made by one of the following methods:

(a) By actual delivery to the person to be served; if a partnership, to one of the partners; if a corporation, to an officer, director, managing agent, or business agent; or, if a limited liability company, to a member or manager.

(b) By common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format.

(c) By posting on the site of the improvement if service as provided by paragraph (a) or paragraph (b) cannot be accomplished.

(2) Notwithstanding subsection (1), service of a notice to owner or a preliminary notice to contractor under s. 255.05, s. 337.18, or s. 713.23 is effective as of the date of mailing if:

(a) The notice is mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid, to the person to be served at any of the addresses set forth in subsection (3);

(b) The notice is mailed within 40 days after the date the lienor first furnishes labor, services, or materials; and

(c)1. The person who served the notice maintains a registered or certified mail log that shows the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing; or

2. The person who served the notice maintains electronic tracking records generated by the United States Postal Service containing the postal tracking number, the name and address of the person served, and verification of the date of receipt by the United States Postal Service.

(3)(a) Service of an instrument pursuant to this section is effective on the date of mailing the instrument if it:

1. Is sent to the last address shown in the notice of commencement or any amendment thereto or, in the absence of a notice of commencement, to the last address shown in the building permit application, or to the last known address of the person to be served; and

2. Is returned as being "refused," "moved, not forwardable," or "unclaimed," or is otherwise not delivered or deliverable through no fault of the person serving the item.

(b) If the address shown in the notice of commencement or any amendment to the notice of commencement, or, in the absence of a notice of commencement, in the building permit application, is incomplete for purposes of mailing or delivery, the person serving the item may complete the address and properly format it according to United States Postal Service addressing standards using information obtained from the property appraiser or another public record without affecting the validity of service under this section.

(4) A notice served by a lienor on one owner or one partner of a partnership owning the real property is deemed notice to all owners and partners.

History.—s. 1, ch. 63-135; s. 11, ch. 65-456; s. 35, ch. 67-254; s. 10, ch. 87-405; s. 11, ch. 90-109; s. 7, ch. 96-383; s. 1768, ch. 97-102; s. 5, ch. 98-135; s. 7, ch. 99-386; ss. 7, 12, ch. 2001-211; s. 20, ch. 2003-2; s. 3, ch. 2006-187; s. 11, ch. 2007-221; s. 9, ch. 2012-211.

Note.—Former s. 84.181.

713.19 Assignment of lien.—A lien or prospective lien, except that of a laborer, may be assigned by the lienor at any time before its discharge. The assignment may be recorded in the clerk's office.

History.—s. 1, ch. 63-135; s. 12, ch. 65-456; s. 35, ch. 67-254.

Note.—Former s. 84.191.

713.20 Waiver or release of liens.—

(1) The acceptance by the lienor of an unsecured note for all or any part of the amount of his or her demand shall not constitute a waiver of his or her lien therefor unless expressly so agreed in writing, nor shall it in any way affect the period for filing the notice under s. 713.06(2), or the claim of lien under s. 713.08.

(2) A right to claim a lien may not be waived in advance. A lien right may be waived only to the extent of labor, services, or materials furnished. Any waiver of a right to claim a lien that is made in advance is unenforceable.

(3) Any person may at any time waive, release, or satisfy any part of his or her lien under this part, either as to the amount due for labor, services, or materials furnished or for labor, services, or materials furnished through a certain date subject to exceptions specified at the time of release, or as to any part or parcel of the real property.

(4) When a lienor is required to execute a waiver or release of lien in exchange for, or to induce payment of, a progress payment, the waiver or release may be in substantially the following form:

WAIVER AND RELEASE OF LIEN
UPON PROGRESS PAYMENT

The undersigned lienor, in consideration of the sum of $, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through _(insert date)_ to _(insert the name of your customer)_ on the job of _(insert the name of the owner)_ to the following property:

(description of property)

This waiver and release does not cover any retention or labor, services, or materials furnished after the date specified.

DATED on , _(year)_. _(Lienor)_

By:

(5) When a lienor is required to execute a waiver or release of lien in exchange for, or to induce payment of, the final payment, the waiver and release may be in substantially the following form:

WAIVER AND RELEASE OF LIEN
UPON FINAL PAYMENT

The undersigned lienor, in consideration of the final payment in the amount of $, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished to _(insert the name of your customer)_ on the job of _(insert the name of the owner)_ to the following described property:

(description of property)

DATED on , _(year)_. _(Lienor)_

By:

(6) A person may not require a lienor to furnish a lien waiver or release of lien that is different from the

forms in subsection (4) or subsection (5).

(7) A lienor who executes a lien waiver and release in exchange for a check may condition the waiver and release on payment of the check. However, in the absence of a payment bond protecting the owner, the owner may withhold from any payment to the contractor the amount of any such unpaid check until any such condition is satisfied.

(8) A lien waiver or lien release that is not substantially similar to the forms in subsections (4) and (5) is enforceable in accordance with the terms of the lien waiver or lien release.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 5, ch. 88-397; s. 8, ch. 96-383; s. 1769, ch. 97-102; s. 5, ch. 97-219; s. 30, ch. 99-6.

Note.—Former s. 84.202.

713.21 Discharge of lien.—A lien properly perfected under [1]this chapter may be discharged by any of the following methods:

(1) By entering satisfaction of the lien upon the margin of the record thereof in the clerk's office when not otherwise prohibited by law. This satisfaction shall be signed by the lienor, the lienor's agent or attorney and attested by said clerk. Any person who executes a claim of lien shall have authority to execute a satisfaction in the absence of actual notice of lack of authority to any person relying on the same.

(2) By the satisfaction of the lienor, duly acknowledged and recorded in the clerk's office. Any person who executes a claim of lien shall have authority to execute a satisfaction in the absence of actual notice of lack of authority to any person relying on the same.

(3) By failure to begin an action to enforce the lien within the time prescribed in this part.

(4) By an order of the circuit court of the county where the property is located, as provided in this subsection. Upon filing a complaint therefor by any interested party the clerk shall issue a summons to the lienor to show cause within 20 days why his or her lien should not be enforced by action or vacated and canceled of record. Upon failure of the lienor to show cause why his or her lien should not be enforced or the lienor's failure to commence such action before the return date of the summons the court shall forthwith order cancellation of the lien.

(5) By recording in the clerk's office the original or a certified copy of a judgment or decree of a court of competent jurisdiction showing a final determination of the action.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 810, ch. 97-102.

[1]Note.—The language "this chapter" predates inclusion of this material in chapter 713 and, when initially included in this section's text, referred to former chapter 84, Mechanics Liens. The Florida Uniform Federal Lien Registration Act was enacted without reference to statutory placement by ch. 92-25, Laws of Florida, and was added as part IV of chapter 713 by the editors.

Note.—Former s. 84.211.

713.22 Duration of lien.—

(1) A lien provided by this part does not continue for a longer period than 1 year after the claim of lien has been recorded or 1 year after the recording of an amended claim of lien that shows a later date of final furnishing of labor, services, or materials, unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction. A lien that has been continued beyond the 1-year period by the commencement of an action is not enforceable against creditors or subsequent purchasers for a valuable consideration and without notice, unless a notice of lis pendens is recorded.

(2) An owner or the owner's attorney may elect to shorten the time prescribed in subsection (1) within which to commence an action to enforce any claim of lien or claim against a bond or other security under s. 713.23 or s. 713.24 by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF LIEN

To: (Name and address of lienor)

You are notified that the undersigned contests the claim of lien filed by you on , (year), and recorded in Book , Page , of the public records of County, Florida, and that the time within which you may file suit to enforce your lien is limited to 60 days from the date of service of this notice. This day of , (year).

Signed: (Owner or Attorney)

The lien of any lienor upon whom such notice is served and who fails to institute a suit to enforce his or her lien within 60 days after service of such notice shall be extinguished automatically. The clerk shall serve, in accordance with s. 713.18, a copy of the notice of contest to the lien claimant at the address shown in the claim of lien or most recent amendment thereto and shall certify to such service and the date of service on the face of the notice and record the notice.

History.—s. 1, ch. 63-135; s. 13, ch. 65-456; s. 35, ch. 67-254; s. 9, ch. 77-353; s. 811, ch. 97-102; s. 31, ch. 99-6; s. 12, ch. 2007-221; s. 10, ch. 2012-211.

Note.—Former s. 84.221.

713.23 Payment bond.—

(1)(a) The payment bond required to exempt an owner under this part shall be furnished by the contractor in at least the amount of the original contract price before commencing the construction of the improvement under the direct contract, and a copy of the bond shall be attached to the notice of commencement when the notice of commencement is recorded. The bond shall be executed as surety by a surety insurer authorized to do business in this state and shall be conditioned that the contractor shall promptly make payments for labor, services, and material to all lienors under the contractor's direct contract. Any form of bond given by a contractor conditioned to pay for labor, services, and material used to improve real property shall be deemed to include the condition of this subsection.

(b) The owner, contractor, or surety shall furnish a true copy of the bond at the cost of reproduction to any lienor demanding it. Any person who fails or refuses to furnish the copy without justifiable cause shall be liable to the lienor demanding the copy for any damages caused by the refusal or failure.

(c) Before beginning or within 45 days after beginning to furnish labor, materials, or supplies, a lienor who is not in privity with the contractor, except a laborer, shall serve the contractor with notice in writing that the lienor will look to the contractor's bond for protection on the work. If a notice of commencement with the attached bond is not recorded before commencement of construction, the lienor not in privity with the contractor may, in the alternative, elect to serve the notice to the contractor up to 45 days after the date the lienor is served with a copy of the bond. A notice to owner pursuant to s. 713.06 that has been timely served on the contractor satisfies the requirements of this paragraph. However, the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded. The notice may be in substantially the following form and may be combined with a notice to owner given under s. 713.06 and, if so, may be entitled "NOTICE TO OWNER/NOTICE TO CONTRACTOR":

NOTICE TO CONTRACTOR

To (name and address of contractor)

The undersigned hereby informs you that he or she has furnished or is furnishing services or materials as follows:

(general description of services or materials) for the improvement of the real property identified as (property description) under an order given by (lienor's customer).

This notice is to inform you that the undersigned intends to look to the contractor's bond to secure payment for the furnishing of materials or services for the improvement of the real property.

(name of lienor)
(signature of lienor or lienor's representative)
(date)
(lienor's address)

(d) In addition, a lienor is required, as a condition precedent to recovery under the bond, to serve a written notice of nonpayment to the contractor and the surety not later than 90 days after the final furnishing of labor, services, or materials by the lienor. A written notice satisfies this condition precedent with respect to the payment described in the notice of nonpayment, including unpaid finance charges due under the lienor's contract, and with respect to any other payments which become due to the lienor after the date of the notice of nonpayment. The time period for serving a written notice of nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor and shall not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph. If the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may at the option of the lienor be calculated from the date specified in this section or the date the lienor is served a copy of the bond. However, the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded. The notice under this paragraph may be in substantially the following form:

NOTICE OF NONPAYMENT

To (name of contractor and address)

(name of surety and address)

The undersigned notifies you that he or she has furnished (describe labor, services, or materials) for the improvement of the real property identified as (property description). The amount now due and unpaid is $.

(signature and address of lienor)

(e) An action for the labor or materials or supplies may not be instituted or prosecuted against the contractor or surety unless both notices have been given, if required by this section. An action may not be instituted or prosecuted against the contractor or against the surety on the bond under this section after 1 year from the performance of the labor or completion of delivery of the materials and supplies. The time period for bringing an action against the contractor or surety on the bond shall be measured from the last day of furnishing labor, services, or materials by the lienor. The time period may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. A contractor or the contractor's attorney may elect to shorten the time within which an action to enforce any claim against a payment bond provided under this section or s. 713.245 must be commenced at any time after a notice of nonpayment, if required, has been served for the claim by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: (Name and address of lienor)

You are notified that the undersigned contests your notice of nonpayment, dated , , and served on the undersigned on , , and that the time within which you may file suit to enforce your claim is limited to 60 days from the date of service of this notice.

DATED on , .

Signed: (Contractor or Attorney)

The claim of any lienor upon whom the notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of the notice shall be extinguished automatically. The contractor or the contractor's attorney shall serve a copy of the notice of contest to the lienor at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

(f) A lienor has a direct right of action on the bond against the surety. Any provision in a payment bond issued on or after October 1, 2012, which further restricts the classes of persons who are protected by the payment bond, which restricts the venue of any proceeding relating to such payment bond, which limits or expands the effective duration of the payment bond, or which adds conditions precedent to the enforcement of a claim against a payment bond beyond those provided in this part is unenforceable. The surety is not entitled to the defense of pro tanto discharge as against any lienor because of changes or modifications in the contract to which the surety is not a party; but the liability of the surety may not be increased beyond the penal sum of the bond. A lienor may not waive in advance his or her right to bring an action under the bond against the surety.

(2) The bond shall secure every lien under the direct contract accruing subsequent to its execution and delivery, except that of the contractor. Every claim of lien, except that of the contractor, filed subsequent to execution and delivery of the bond shall be transferred to it with the same effect as liens transferred under s. 713.24. Record notice of the transfer shall be effected by the contractor, or any person having an interest in the property against which the claim of lien has been asserted, by recording in the clerk's office a notice, with the bond attached, in substantially the following form:

NOTICE OF BOND

To (Name and Address of Lienor)

You are notified that the claim of lien filed by you on , , and recorded in Official Records Book at page of the public records of County, Florida, is secured by a bond, a copy being attached.

Signed: (Name of person recording notice)

The notice shall be verified. The person recording the notice of bond shall serve a copy of the notice with a copy of the bond to the lienor at the address shown in the claim of lien, or the most recent amendment to it; shall certify to the service on the face of the notice; and shall record the notice.

(3) A payment bond in substantially the following form shall be sufficient:

PAYMENT BOND

BY THIS BOND We, , as Principal, and , a corporation, as Surety, are bound to , herein called Owner, in the sum of $ for the payment of which we bind ourselves, our heirs, personal representatives, successors, and

assigns, jointly and severally.

THE CONDITION OF THIS BOND is that if Principal:

1. Promptly makes payments to all lienors supplying labor, material, and supplies used directly or indirectly by Principal in the prosecution of the work provided in the contract dated , , between Principal and Owner for construction of , the contract being made a part of this bond by reference; and

2. Pays Owner all loss, damage, expenses, costs, and attorney's fees, including appellate proceedings, that Owner sustains because of default by Principal under paragraph 1. of this bond;

then this bond is void; otherwise, it remains in full force.

Any changes in or under the contract documents and compliance or noncompliance with formalities connected with the contract or with the changes do not affect Surety's obligation under this bond.

DATED on , .

(Principal) (SEAL)

(Surety's name)

By

As Attorney in Fact

(4) The provisions of s. 713.24(3) apply to bonds under this section except when those provisions conflict with this section.

(5) A waiver and release of lien pursuant to s. 713.20 given by a lienor shall constitute a waiver and release in a like amount of the lienor's right to make a claim against a payment bond under this section.

History.—s. 1, ch. 63-135; s. 14, ch. 65-456; s. 35, ch. 67-254; s. 10, ch. 77-353; s. 8, ch. 80-97; s. 5, ch. 87-74; s. 6, ch. 88-397; s. 12, ch. 90-109; s. 812, ch. 97-102; s. 6, ch. 98-135; s. 32, ch. 99-6; s. 8, ch. 99-386; s. 8, ch. 2001-211; s. 10, ch. 2005-227; s. 11, ch. 2012-211.

Note.—Former s. 84.231.

713.235 Waivers of right to claim against payment bond; forms.—

(1) When a person is required to execute a waiver of his or her right to make a claim against a payment bond provided pursuant to s. 713.23 or s. 713.245, in exchange for, or to induce payment of, a progress payment, the waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND
(PROGRESS PAYMENT)

The undersigned, in consideration of the sum of $ hereby waives its right to claim against the payment bond for labor, services, or materials furnished through (insert date), to (insert the name of your customer) on the job of (insert the name of the owner), for improvements to the following described project:

(description of project)

This waiver does not cover any retention or any labor, services, or materials furnished after the date specified.

DATED on

(Lienor)

By:

(2) When a person is required to execute a waiver of his or her right to make a claim against a payment bond provided pursuant to s. 713.23 or s. 713.245, in exchange for, or to induce payment of, the final payment, the waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM
AGAINST THE PAYMENT BOND
(FINAL PAYMENT)

The undersigned, in consideration of the final payment in the amount of $, hereby waives its right to claim against the payment bond for labor, services, or materials furnished to (insert the name of your customer) on the job of (insert the name of the owner) , for improvements to the following described project:

(description of project)

DATED on

(Lienor)
By:

(3) A person may not require a claimant to furnish a waiver that is different from the forms in subsections (1) and (2).

(4) A person who executes a waiver in exchange for a check may condition the waiver on payment of the check.

(5) A waiver that is not substantially similar to the forms in this section is enforceable in accordance with its terms.

History.—s. 7, ch. 98-135.

713.24 Transfer of liens to security.—

(1) Any lien claimed under this part may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either:

(a) Depositing in the clerk's office a sum of money, or

(b) Filing in the clerk's office a bond executed as surety by a surety insurer licensed to do business in this state,

either to be in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for 3 years, plus $1,000 or 25 percent of the amount demanded in the claim of lien, whichever is greater, to apply on any attorney's fees and court costs that may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded. Upon making such deposit or filing such bond, the clerk shall make and record a certificate showing the transfer of the lien from the real property to the security and shall mail a copy thereof by registered or certified mail to the lienor named in the claim of lien so transferred, at the address stated therein. Upon filing the certificate of transfer, the real property shall thereupon be released from the lien claimed, and such lien shall be transferred to said security. In the absence of allegations of privity between the lienor and the owner, and subject to any order of the court increasing the amount required for the lien transfer deposit or bond, no other judgment or decree to pay money may be entered by the court against the owner. The clerk shall be entitled to a service charge for making and serving the certificate, in the amount of up to $20. If the transaction involves the transfer of multiple liens, an additional charge of up to $10 for each additional lien shall be charged. For recording the certificate and approving the bond, the clerk shall receive her or his usual statutory service charges as

prescribed in s. 28.24. Any number of liens may be transferred to one such security.

(2) Any excess of the security over the aggregate amount of any judgments or decrees rendered plus costs actually taxed shall be repaid to the party filing the same or her or his successor in interest. Any deposit of money shall be considered as paid into court and shall be subject to the provisions of law relative to payments of money into court and the disposition of same.

(3) Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county where such security is deposited, or file a motion in a pending action to enforce a lien, for an order to require additional security, reduction of security, change or substitution of sureties, payment of discharge thereof, or any other matter affecting said security. If the court finds that the amount of the deposit or bond in excess of the amount claimed in the claim of lien is insufficient to pay the lienor's attorney's fees and court costs incurred in the action to enforce the lien, the court must increase the amount of the cash deposit or lien transfer bond. Nothing in this section shall be construed to vest exclusive jurisdiction in the circuit courts over transfer bond claims for nonpayment of an amount within the monetary jurisdiction of the county courts.

(4) If a proceeding to enforce a transferred lien is not commenced within the time specified in s. 713.22 or if it appears that the transferred lien has been satisfied of record, the clerk shall return said security upon request of the person depositing or filing the same, or the insurer. If a proceeding to enforce a lien is commenced in a court of competent jurisdiction within the time specified in s. 713.22 and, during such proceeding, the lien is transferred pursuant to this section or s. 713.13(1)(e), an action commenced within 1 year after the transfer, unless otherwise shortened by operation of law, in the same county or circuit court to recover against the security shall be deemed to have been brought as of the date of filing the action to enforce the lien, and the court shall have jurisdiction over the action.

History.—s. 1, ch. 63-135; s. 15, ch. 65-456; s. 35, ch. 67-254; s. 6, ch. 77-354; s. 6, ch. 87-74; s. 813, ch. 97-102; s. 8, ch. 98-135; s. 111, ch. 2003-402; s. 73, ch. 2004-265; s. 11, ch. 2005-227; s. 38, ch. 2008-111.

Note.—Former s. 84.241.

713.245 Conditional payment bond.—

(1) Notwithstanding any provisions of ss. 713.23 and 713.24 to the contrary, if the contractor's written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the following provisions are complied with:

(a) The bond is listed in the notice of commencement for the project as a conditional payment bond and is recorded together with the notice of commencement for the project prior to commencement of the project.

(b) The words "conditional payment bond" are contained in the title of the bond at the top of the front page.

(c) The bond contains on the front page, in at least 10-point type, the statement: THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.

(2) Except as specified in this section, all bonds issued under this section must conform to the requirements of s. 713.23(1)(a), (b), (f), and (4). No action shall be instituted or prosecuted against the contractor or the surety after 1 year from the date the lien is transferred to the bond.

(3) The owner's property is not exempt from liens filed under this part. All lienors must comply with the

provisions of this part to preserve and perfect those lien rights.

(4) Within 90 days after a claim of lien is recorded for labor, services, or materials for which the contractor has been paid, the owner or the contractor may record a notice of bond as specified in s. 713.23(2), together with a copy of the bond and a sworn statement in substantially the following form:

CERTIFICATE OF PAYMENT
TO THE CONTRACTOR

TO: Lienor (name and address from claim of lien)
Contractor (name and address)
Surety (name and address)

Under penalties of perjury, the undersigned certifies that the bond recorded with this certificate conforms with s. 713.245, F.S., that the bond is in full force and effect, and that the contractor has been paid $ for the labor, services, and materials described in the Claim of Lien filed by dated , (year), and recorded , (year), in Official Records Book at Page of the Public Records of County, Florida.

Dated this day of , (year).

(Owner)
(Address)

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed) and subscribed before me this day of , (year), by (name of person making statement).

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(Contractor)
(Address)

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed) and subscribed before me this day of , (year), by (name of person making statement).

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

Any notice of bond recorded more than 90 days after the recording of the claim of lien shall have no force or

effect as to that lien unless the owner, the contractor and the surety all sign the notice of bond.

(5) The clerk shall serve a copy of the notice, the bond, and the certificate on the contractor, the surety, and the lienor; certify to the service on the face of the notice, the bond, and the certificate; record the notice, the bond, and the certificate; and collect a fee in accordance with s. 713.23(2).

(6) The contractor may join in a certificate of payment to the contractor at any time by recording a sworn statement substantially in the following form:

JOINDER IN CERTIFICATE OF PAYMENT

TO: Owner (name and address from certificate of payment)
Lienor (name and address from claim of lien)
Surety (name and address)

The undersigned joins in the Certificate of Payment to the Contractor recorded on , (year), in Official Records Book at Page of the Public Records of County, Florida, and certifies that the facts stated in the Certificate of Payment to the Contractor are true and correct.

Dated this day of , (year).

(Name)
(Address)

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed) and subscribed before me this day of , (year), by (name of person making statement).

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(7) The clerk shall serve the joinder in certificate of payment on the owner, the surety, and the lienor; certify to the service on the face of the joinder; record the joinder; and collect a fee in accordance with s. 713.23(2).

(8) If the contractor disputes the certificate of payment to the contractor, the contractor must record, not later than 15 days after the date the clerk certifies service of the certificate, a sworn statement in substantially the following form:

NOTICE OF CONTEST OF PAYMENT

TO: Owner (name and address from certificate of payment)
Lienor (name and address from claim of lien)
Surety (name and address)

Under penalties of perjury, the undersigned certifies that the contractor has not been paid or has only been paid $ for the labor, services, and materials described in the Certificate of Payment to the Contractor recorded in Official Records Book at Page of the Public Records of County, Florida.

Dated this day of , (year).

(Name)
(Address)

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed) and subscribed before me this day of , (year), by (name of person making statement).

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

(9) The clerk shall serve a copy of the notice of contest of payment on the owner, the lienor, and the surety; certify service on the face of the notice; record the notice; and collect a fee in accordance with s. 713.23(2).

(10) If the contractor has signed the certificate of payment to the contractor or the joinder in the certificate or the contractor fails to record a notice of contest of payment within 15 days after the date the clerk certifies service of a certificate of payment to the contractor signed by the owner, the lien shall transfer to the bond to the extent of payment specified in the certificate of payment to the contractor. To the extent the lien exceeds the amount specified in the certificate of payment to the contractor, such amount shall remain as a lien on the owner's property. The surety may assert all claims or defenses of the owner regarding the validity of the claim of lien or of the contractor regarding the amount due the lienor.

(11) If the notice of contest of payment specifies that the contractor has been paid a portion of the amount due the lienor, the lien shall transfer to the bond to the extent of the payment specified in the notice of contest of payment. To the extent the lien exceeds the amount specified in the notice of contest of payment, such amount shall remain as a lien on the owner's property. The surety may assert all claims or defenses of the owner regarding the validity of the claim of lien or of the contractor regarding the amount due the lienor.

(12) If there are any material misstatements of fact made by the owner or the contractor in any certificate of payment to the contractor, or by the contractor in any notice of contest of payment, the person making the material misstatement is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The penalties apply individually and to the business entity if the false certificate is signed in a representative capacity.

(13) The certificate of payment to the contractor and the notice of contest of payment must be signed by the owner or the contractor individually if she or he is a natural person, by the general partner if the owner or the contractor is a limited partnership, by a partner if the owner or the contractor is a general partnership, by the president or a vice president if the owner or the contractor is a corporation, or by any authorized agent if the owner or the contractor is any other type of business entity.

(14) In an action to enforce a lien, the owner shall not be considered the prevailing party solely because the lien is transferred to a conditional payment bond after the action to enforce the lien is brought.

History.—s. 13, ch. 90-109; s. 9, ch. 92-286; s. 3, ch. 93-99; s. 58, ch. 95-211; s. 814, ch. 97-102; s. 16, ch. 98-246; s. 9, ch. 2001-211.

713.25 Applicability of ch. 65-456.—This act shall take effect on July 1, 1965, but shall not apply to any act required to be done within a time period which is running on that date nor shall apply to existing projects where its operation would impair vested rights.

History.—s. 17, ch. 65-456; s. 35, ch. 67-254.

Note.—Former s. 84.242.

713.26 Redemption and sale.—The right of redemption upon all sales under this part shall exist in favor of the person whose interest is sold and may be exercised in the same manner as is or may be provided for redemption of real property from sales under mortgages.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 4, ch. 71-5.

Note.—Former s. 84.251.

713.27 Interplead.—An owner or other person holding funds for disbursement on an improvement shall have the right to interplead such lienor and any other person having or claiming to have an interest in the real property improved or a contract relating to the improvement thereof, whenever there is a dispute between lienors as to the amounts due or to become due them. If the court decrees the interpleader, it may transfer all claims to the funds held by the plaintiff. In such case the court shall require said fund to be deposited in registry of court and, effective upon such deposit, shall decree the real property to be free of all liens and claims of lien of the parties to the suit.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254.

Note.—Former s. 84.271.

713.28 Judgments in case of failure to establish liens; personal and deficiency judgments or decrees.—

(1) If a lienor shall fail, for any reason, to establish a lien for the full amount found to be due him or her in an action to enforce the same under the provisions of this part, he or she may, in addition to the lien decreed in his or her favor, recover a judgment or decree in such action against any party liable therefor for such sums in excess of the lien as are due him or her or which the lienor might recover in an action on a contract against any party to the action from whom such sums are due him or her.

(2) In any action heretofore or hereafter brought a court may, either before or after the final adjudication, award a summary money judgment or decree in favor of any party. This shall not preclude the rendition of other judgments or decrees in the action.

(3) If, upon the sale of the real property under any judgment or decree there is a deficiency of proceeds to pay the amount of such judgment or decree, the judgment or decree may be enforced for the deficiency against any person liable therefor in the same manner and under the same conditions as deficiency decrees in mortgage foreclosures. Any payment made on account of any judgment or decree in favor of a party shall be credited on any other judgment or decree rendered in favor of that party in the same action.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 815, ch. 97-102.

Note.—Former s. 84.281.

713.29 Attorney's fees.—In any action brought to enforce a lien or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 11, ch. 77-353; s. 14, ch. 90-109; s. 7, ch. 92-286; s. 816, ch. 97-102.

Note.—Former s. 84.291.

713.30 Other actions not barred.—This part shall be cumulative to other existing remedies and nothing contained in this part shall be construed to prevent any lienor or assignee under any contract from

maintaining an action thereon at law in like manner as if he or she had no lien for the security of his or her debt, and the bringing of such action shall not prejudice his or her rights under this part, except as herein otherwise expressly provided.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 817, ch. 97-102.

Note.—Former s. 84.301.

713.31 Remedies in case of fraud or collusion.—

(1) When the owner or any lienor shall, by fraud or collusion, deprive or attempt to deprive any lienor of benefits or rights to which such lienor is entitled under this part by establishing or manipulating the contract price or by giving false affidavits, releases, invoices, worthless checks, statements, or written instruments permitted or required under this part relating to the improvement of real property hereunder to the detriment of any such lienor, the circuit court in chancery shall have jurisdiction, upon a complaint filed by such lienor, to issue temporary and permanent injunctions, order accountings, grant discovery, utilize all remedies available under creditors' bills and proceedings supplementary to execution, marshal assets, and exercise any other appropriate legal or equitable remedies or procedures without regard to the adequacy of a remedy at law or whether or not irreparable damage has or will be done.

(2)(a) Any lien asserted under this part in which the lienor has willfully exaggerated the amount for which such lien is claimed or in which the lienor has willfully included a claim for work not performed upon or materials not furnished for the property upon which he or she seeks to impress such lien or in which the lienor has compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration shall be deemed a fraudulent lien.

(b) It is a complete defense to any action to enforce a lien under this part, or against any lien in any action in which the validity of the lien is an issue, that the lien is a fraudulent lien; and the court so finding is empowered to and shall declare the lien unenforceable, and the lienor thereupon forfeits his or her right to any lien on the property upon which he or she sought to impress such fraudulent lien. However, a minor mistake or error in a claim of lien, or a good faith dispute as to the amount due does not constitute a willful exaggeration that operates to defeat an otherwise valid lien.

(c) An owner against whose interest in real property a fraudulent lien is filed, or any contractor, subcontractor, or sub-subcontractor who suffers damages as a result of the filing of the fraudulent lien, shall have a right of action for damages occasioned thereby. The action may be instituted independently of any other action, or in connection with a summons to show cause under s. 713.21, or as a counterclaim or cross-claim to any action to enforce or to determine the validity of the lien. The prevailing party in an action under this paragraph may recover reasonable attorney's fees and costs. If the lienor who files a fraudulent lien is not the prevailing party, the lienor shall be liable to the owner or the defrauded party who prevails in an action under this subsection in damages, which shall include court costs, clerk's fees, a reasonable attorney's fee and costs for services in securing the discharge of the lien, the amount of any premium for a bond given to obtain the discharge of the lien, interest on any money deposited for the purpose of discharging the lien, and punitive damages in an amount not exceeding the difference between the amount claimed by the lienor to be due or to become due and the amount actually due or to become due.

(3) Any person who willfully files a fraudulent lien, as defined in this section, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. A state attorney or the statewide prosecutor, upon the filing of an indictment or information against a contractor, subcontractor, or sub-subcontractor which charges such person with a violation of this subsection, shall forward a copy of the indictment or information to the Department of Business and Professional Regulation. The Department of Business and Professional Regulation shall promptly open an investigation into the matter, and if probable cause is found, shall furnish a copy of any investigative report to the state attorney or statewide prosecutor

who furnished a copy of the indictment or information and to the owner of the property which is the subject of the investigation.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 12, ch. 77-353; s. 260, ch. 79-400; s. 9, ch. 80-97; s. 15, ch. 90-109; s. 8, ch. 95-240; s. 818, ch. 97-102; s. 6, ch. 2003-177; s. 13, ch. 2007-221.

Note.—Former s. 84.311.

713.32 Insurance proceeds liable for demands.—The proceeds of any insurance that by the terms of the policy contract are payable to the owner of improved real property or a lienor and actually received or to be received by him or her because of the damage, destruction, or removal by fire or other casualty of an improvement on which lienors have furnished labor or services or materials shall, after the owner or lienor, as the case may be, has been reimbursed therefrom for any premiums paid by him or her, be liable to liens or demands for payment provided by this part to the same extent and in the same manner, order of priority, and conditions as the real property or payments under a direct contract would have been, if the improvement had not been so damaged, destroyed, or removed. The insurer may pay the proceeds of the policy of insurance to the insured named in the policy and thereupon any liability of the insurer under this part shall cease. The named insured who receives any proceeds of the policy shall be deemed a trustee of the proceeds, and the proceeds shall be deemed trust funds for the purposes designated by this section for a period of 1 year from the date of receipt of the proceeds. This section shall not apply to that part of the proceeds of any policy of insurance payable to a person, including a mortgagee, who holds a lien perfected before the recording of the notice of commencement or recommencement.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 13, ch. 77-353; s. 819, ch. 97-102; s. 72, ch. 99-3.

Note.—Former s. 84.321.

713.33 Disbursing agent and others may rely on owner's notices.—When the proceeds of a construction or improvement loan or any portion thereof are being disbursed by a person other than the owner, any affidavit, notice or other instrument which is permitted or required under this part to be furnished to the owner may be relied upon by such other person in making such disbursements to the same extent as the owner is entitled to rely upon the same.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254.

Note.—Former s. 84.331.

713.345 Moneys received for real property improvements; penalty for misapplication.—

(1)(a) A person, firm, or corporation, or an agent, officer, or employee thereof, who receives any payment on account of improving real property must apply such portion of any payment to the payment of all amounts then due and owing for services and labor which were performed on, or materials which were furnished for, such improvement prior to receipt of the payment. This paragraph does not prevent any person from withholding any payment, or any part of a payment, in accordance with the terms of a contract for services, labor, or materials, or pursuant to a bona fide dispute regarding the amount due, if any, for such services, labor, or materials.

(b) Any person who knowingly and intentionally fails to comply with paragraph (a) is guilty of misapplication of construction funds, punishable as follows:

1. If the amount of payments misapplied has an aggregate value of $100,000 or more, the violator is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. If the amount of payments misapplied has an aggregate value of $1,000 or more but less than $100,000, the violator is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. If the amount of payments misapplied has an aggregate value of less than $1,000, the violator is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) A permissive inference that a person knowingly and intentionally misapplied construction funds in violation of this subsection is created when a valid lien has been recorded against the property of an owner for labor, services, or materials; the person who ordered the labor, services, or materials has received sufficient funds to pay for such labor, services, or materials; and the person has failed, for a period of at least 45 days from receipt of the funds, to remit sufficient funds to pay for such labor, services, or materials, except for funds withheld pursuant to paragraph (a).

(d) A state attorney or the statewide prosecutor, upon the filing of an indictment or information against a contractor, subcontractor, or sub-subcontractor which charges such person with a violation of paragraph (b), shall forward a copy of the indictment or information to the Department of Business and Professional Regulation. The Department of Business and Professional Regulation shall promptly open an investigation into the matter and, if probable cause is found, shall furnish a copy of any investigative report to the state attorney or statewide prosecutor who furnished a copy of the indictment or information and to the owner of the property which is the subject of the investigation.

(2) This section does not apply to mortgage bankers or their agents, servants, or employees for their acts in the usual course of the business of lending or disbursing mortgage funds.

History.—s. 1, ch. 87-74; s. 7, ch. 88-397; s. 17, ch. 90-109; s. 7, ch. 2003-177; s. 12, ch. 2005-227.

713.346 Payment on construction contracts.—

(1) Any person who receives a payment for constructing or altering permanent improvements to real property shall pay, in accordance with the contract terms, the undisputed contract obligations for labor, services, or materials provided on account of such improvements.

(2) The failure to pay any undisputed obligations for such labor, services, or materials within 30 days after the date the labor, services, or materials were furnished and payment for such labor, services, or materials became due, or within 30 days after the date payment for such labor, services, or materials is received, whichever last occurs, shall entitle any person providing such labor, services, or materials to the procedures specified in subsection (3) and the remedies provided in subsection (4).

(3) Any person providing labor, services, or materials for improvements to real property may file a verified complaint alleging:

(a) The existence of a contract, as defined in s. 713.01, to improve real property.

(b) A description of the labor, services, or materials provided and alleging that the labor, services, or materials were provided in accordance with the contract.

(c) The amount of the contract price.

(d) The amount, if any, paid pursuant to the contract.

(e) The amount that remains unpaid pursuant to the contract, and the amount thereof that is undisputed.

(f) That the undisputed amount has remained due and payable pursuant to the contract for more than 30 days after the date the labor or services were accepted or the materials were received.

(g) That the person against whom the complaint was filed has received payment on account of the labor, services, or materials described in the complaint more than 30 days prior to the date the complaint was filed.

(4) After service of the complaint, the court shall conduct an evidentiary hearing on the complaint, upon not less than 15 days' written notice. The person providing labor, services, or materials is entitled to the following remedies to the extent of the undisputed amount due for labor or services performed or materials supplied, and upon proof of each allegation in the complaint:

(a) An accounting of the use of any such payment from the person who received such payment.

(b) A temporary injunction against the person who received the payment, subject to the bond requirements specified in the Florida Rules of Civil Procedure.

(c) Prejudgment attachment against the person who received the payment, in accordance with each of the requirements of chapter 76.

(d) Such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

(5) The remedies specified in subsection (4) must be granted without regard to any other remedy at law and without regard to whether or not irreparable damage has occurred or will occur.

(6) The remedies specified in subsection (4) do not apply:

(a) To the extent of a bona fide dispute regarding any portion of the contract price.

(b) In the event the plaintiff has committed a material breach of the contract which would relieve the defendant from the obligations under the contract.

(7) The prevailing party in any proceeding under this section is entitled to recover costs, including a reasonable attorney's fee, at trial and on appeal.

History.—s. 8, ch. 88-397; s. 18, ch. 90-109.

713.3471 Lender responsibilities with construction loans.—

(1) Prior to a lender making any loan disbursement on any construction loan secured by residential real property directly to the owner, which, for purposes of this subsection, means only a natural person, into the owner's account or accounts, or jointly to the owner and any other party, the lender shall mail, deliver by electronic mail or other electronic format or facsimile, or personally deliver the following written notice to the borrowers in bold type larger than any other type on the page:

WARNING!

YOUR LENDER IS MAKING A LOAN DISBURSEMENT DIRECTLY TO YOU AS THE BORROWER, OR JOINTLY TO YOU AND ANOTHER PARTY. TO PROTECT YOURSELF FROM HAVING TO PAY TWICE FOR THE SAME LABOR, SERVICES, OR MATERIALS USED IN MAKING THE IMPROVEMENTS TO YOUR PROPERTY, BE SURE THAT YOU REQUIRE YOUR CONTRACTOR TO GIVE YOU LIEN RELEASES FROM EACH LIENOR WHO HAS SENT YOU A NOTICE TO OWNER EACH TIME YOU MAKE A PAYMENT TO YOUR CONTRACTOR.

This subsection does not apply when the owner is a contractor licensed under chapter 489 or is a person who creates parcels or offers parcels for sale or lease in the ordinary course of business.

(2)(a) Within 5 business days after a lender makes a final determination, prior to the distribution of all funds available under a construction loan, that the lender will cease further advances pursuant to the loan, the lender shall serve written notice of that decision on the contractor and on any other lienor who has given the lender notice. The lender shall not be liable to the contractor based upon the decision of the lender to cease further advances if the lender gives the contractor notice of such decision in accordance with this subsection and the decision is otherwise permitted under the loan documents.

(b) The failure to give notice to the contractor under paragraph (a) renders the lender liable to the contractor to the extent of the actual value of the materials and direct labor costs furnished by the contractor plus 15 percent for overhead, profit, and all other costs from the date on which notice of the lender's decision should have been served on the contractor and the date on which notice of the lender's decision is served on the contractor. The lender and the contractor may agree in writing to any other reasonable method for determining the value of the labor, services, and materials furnished by the contractor.

(c) The liability of the lender shall in no event be greater than the amount of undisbursed funds at the time the notice should have been given unless the failure to give notice was done for the purpose of defrauding the contractor. The lender is not liable to the contractor for consequential or punitive damages

for failure to give timely notice under this subsection. The contractor shall have a separate cause of action against the lender for damages sustained as the result of the lender's failure to give timely notice under this subsection. Such separate cause of action may not be used to hinder or delay any foreclosure action filed by the lender, may not be the basis of any claim for an equitable lien or for equitable subordination of the mortgage lien, and may not be asserted as an offset or a defense in the foreclosure case.

(d) For purposes of serving notice on the contractor under this subsection, the lender may rely on the name and address of the contractor listed in the notice of commencement or, if no notice of commencement is recorded, on the name and address of the contractor listed in the uniform building permit application. For purposes of serving notice on any other lienor under this subsection, the lender may rely upon the name and address of the lienor listed in the notice to owner.

(e) The contractor or any other lienor may not waive the right to receive notice under this paragraph.

(3)(a) If the lender and the borrower have designated a portion of the construction loan proceeds, the borrower may not authorize the lender to disburse the funds so designated for any other purpose until the owner serves the contractor and any other lienor who has given the owner a notice to owner with written notice of that decision, including the amount of such loan proceeds to be disbursed. For the purposes of this subsection, the term "designated construction loan proceeds" means that portion of the loan allocated to actual construction costs of the facility and shall not include allocated loan proceeds for tenant improvements where the contractor has no contractual obligation or work order to proceed with such improvements. The lender shall not be liable to the contractor based upon the reallocation of the loan proceeds or the disbursement of the loan proceeds if the notice is timely given in accordance with this subsection and the decision is otherwise permitted under the loan documents.

(b) If the lender is permitted under the loan documents to make disbursements from the loan contrary to the original loan budget without the borrower's prior consent, the lender is responsible for serving the notice to the contractor or other lienor required under this subsection.

(c) This subsection does not apply to a residential project of four units or less.

(d) This subsection does not apply to construction loans of less than $1 million unless the lender has committed to make more than one loan, the total of which loans are greater than $1 million, for the purpose of evading this subsection.

(e) The owner or the lender is not required to give notice to the contractor or any other lienor under this subsection unless the total amount of all disbursements described in paragraph (a) exceed 5 percent of the original amount of the designated construction loan proceeds or $100,000, whichever is less.

(f) Disbursement of loan proceeds contrary to this subsection renders the lender liable to the contractor to the extent of any such disbursements or to the extent of the actual value of the materials and direct labor costs plus 15 percent for overhead, profit, and all other costs, whichever is less. The lender is not liable to the contractor for consequential or punitive damages for disbursing loan proceeds in violation of this subsection. The contractor shall have a separate cause of action against the lender for damages sustained as the result of the disbursement of loan proceeds in violation of this subsection. Such separate cause of action may not be used to hinder or delay any foreclosure action filed by the lender, may not be the basis of any claim for equitable subordination of the mortgage lien, and may not be asserted as an offset or a defense in the foreclosure case.

(g) For purposes of serving notice on the contractor under this subsection, the lender may rely upon the name and address of the contractor listed in the notice of commencement or, if no notice of commencement is recorded, the name and address of the contractor listed in the uniform building permit application. For purposes of serving notice on any other lienor under this subsection, the lender may rely upon the name and address of the lienor listed in the notice to owner.

(h) For purposes of this subsection, the lender may rely upon a written statement, signed under oath by the contractor or any other lienor, that confirms that the contractor or the lienor has received the written notice required by this subsection.

(i) A contractor and any other lienor may not waive his or her right to receive notice under this subsection.

History.—s. 8, ch. 92-286; s. 820, ch. 97-102; s. 8, ch. 2003-177; s. 13, ch. 2005-227.

713.35 Making or furnishing false statement.—Any person, firm, or corporation who knowingly and intentionally makes or furnishes to another person, firm, or corporation an affidavit, a waiver or release of lien, or other document, whether or not under oath, containing false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property in this state, knowing that the one to whom it was furnished might rely on it, and the one to whom it was furnished will part with draw payments or final payment relying on the truth of such statement as an inducement to do so commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083. A state attorney or the statewide prosecutor, upon the filing of an indictment or information against a contractor, subcontractor, or sub-subcontractor which charges such person with a violation of this section, shall forward a copy of the indictment or information to the Department of Business and Professional Regulation. The Department of Business and Professional Regulation shall promptly open an investigation into the matter and, if probable cause is found, shall furnish a copy of any investigative report to the state attorney or statewide prosecutor who furnished a copy of the indictment or information and to the owner of the property which is the subject of the investigation.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 9, ch. 95-240; s. 9, ch. 2003-177; s. 4, ch. 2006-187.
Note.—Former s. 84.351.

713.37 Rule of construction.—This part shall not be subject to a rule of liberal construction in favor of any person to whom it applies.

History.—s. 15, ch. 77-353.

PART II
MISCELLANEOUS LIENS

713.50 Liens upon property.
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713.596 Molder's liens.
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713.61 Liens for manufacturing and repairing articles.
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RESIDENTIAL REAL ESTATE TRACK

Vicki L. Berman, Shareholder with Dean Mead

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SPEAKER INFORMATION

SELECT PRINCIPLES OF COMMERCIAL LEASING

Vicki L. Berman
Shareholder with Dean Mead

Vicki L. Berman is a shareholder with the firm of Dean Mead and has been with the firm for over 30 years. During that time, she has represented buyers and sellers, landlords and tenants, borrowers and lenders, investors, brokers, consultants and developers in a wide variety of commercial real estate transactions. She has principal responsibility for one of the firm's largest clients, a REIT, which is currently the largest office landlord in Orlando.

She also chairs the team which represents the firm's largest client, a major Florida landowner, and has handled several significant transactions for the purchase and sale of real estate, including several 1031 transactions. She graduated from the University of Florida in 1980 with a Bachelor of Arts in English and graduated from Duke University Law School in 1984.

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PRINCIPLES OF COMMERCIAL LEASING

FUND ASSEMBLY

MAY 7, 2016

COMMERCIAL LEASING

Note: I would like to thank my colleague, Alex Van Heyde, who provided assistance in the research and drafting of these materials.

Disclaimer: The lease provisions provided in this material are only examples of language which may be used in a lease. They do not fit every situation or any particular situation. They do not necessarily favor one particular party to a lease. These provisions may be used only with full consideration of the facts and circumstances applicable to the lease in question. In addition, the views and opinions expressed by the speaker are the views and opinions of the speaker only and are not to be construed or interpreted as opinions of law.

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PRINCIPLES OF COMMERCIAL LEASING

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PRINCIPLES OF COMMERCIAL LEASING

1. THE LANDLORD GETS TO PICK HIS TENANT.

Discussion:

- Most leases require landlord's consent to assignment or subletting.
- Most tenants ask that the consent not be unreasonably withheld.
- Even without saying this, if the clause does not state that the consent may be withheld "in the landlord's sole discretion", a reasonableness standard will likely be implied.
- For a good treatment of this issue, please see Fernandez v. Vasquez, 397 So. 2nd 1171 (Fla 3rd DCA 1981).
    - The primary legal principle at work here is that Florida courts espouse this "implied covenant of good faith" from contract law, and apply that legal theory when evaluating a landlord's denial of an assignment or sublease.
- The factors that will generally be considered reasonable include the following:
    - Financial responsibility.
    - relationship to the suitability of the premises.
    - The need for alterations.
    - The legality of the proposed use.
    - The nature of the occupancy.

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- But what about other factors that may affect the landlord, like the following:
  - Does the assignee have extraordinary needs for parking or electricity or other services?
  - Is the assignee in a business with lots of people coming in to the office, like the payroll department of a big company or a call center?
  - Does the assignee enjoy sovereign immunity?
  - Is the assignee a foreign entity beyond the reach of our jurisdiction?
  - Is the assignee an existing tenant in the building or someone with whom the landlord is negotiating for other space in the building?
  - Some tenants argue that the landlord cannot be economically disadvantaged if the tenant remains liable either in the case of an assignment or subletting. This argument does not hold water for the factors just enumerated.
- On the flipside, when the tenant is a publicly traded company with many stores or offices and is selling its stock or assets on a company-wide basis, it is not commercially reasonable for a landlord to impair that sale.
- Be aware that a tenant can sell its stock, membership interest or other stake in the tenant entity. Make sure that this is covered as a "deemed" assignment.

Attachments:
Sample – Assignment & Subletting - Absolute Discretion
Sample – Assignment & Subletting - Reasonableness Standard
Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. 3d DCA 1990)
Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc (Fla. 2d DCA 2007)

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 1

Assignment and Subletting. Tenant agrees not to sell, assign, mortgage, pledge or in any manner transfer or encumber this Lease, or any estate or interest thereunder, and not to sublet or assign the Leased Premises or any part thereof, whether by operation or law or otherwise, and not to permit any licensee or concessionaire therein, without Landlord's consent, which may be withheld by Landlord in Landlord's sole discretion.

Landlord's consent to any assignment or subletting shall not release Tenant from Tenant's obligations hereunder or be construed or taken as a waiver of any of Landlord's rights or remedies hereunder. At any time after any assignment of this Lease, or any sublease under this Lease, Landlord may, at Landlord's sole option, exercisable in writing to both Tenant and to any assignee or subtenant, elect to declare and hold the assignee or subtenant primarily liable under this Lease, in which event said assignee or subtenant shall pay all rent and perform all covenants, terms and conditions of this Lease as fully as if said assignee or subtenant had been named Tenant and assumed the obligations imposed upon Tenant by the Lease in the first instance.

Any written request by Tenant for Landlord to approve a proposed assignment or sublet shall be accompanied by a true, correct and complete copy of the proposed instrument of assignment or sublease and the current financial statement of the proposed assignee or subtenant.

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If the Leased Premises, or any part thereof, be sublet or occupied by any person or entity other than Tenant, Landlord may collect rent from the assignee, sublessee or occupant and apply the net amount collected to the Base Rent and additional rent herein reserved, but such collection shall not be deemed a waiver or release of the prohibition provided against assignment and subletting contained herein. As used herein, the term "assignment" shall include: (1) an assignment by operation of law; (2) the imposition of any lien, encumbrance or other security interest in or against the Leased Premises or the Property; (3) any lawful levy or sale on execution or other legal process and any assignment of sale in bankruptcy or insolvency or under any compulsory procedure or the appointment of a receiver by or for Tenant by a state or federal court; (4) if Tenant is a corporation, a substitution or change in the composition of the shareholders holding a majority interest in Tenant; (5) if Tenant is a limited liability company, a substitution or change in the managing member or managing members of Tenant; (6) if Tenant is a limited partnership, a substitution or change in the general partner or general partners of Tenant; or (5) if Tenant is general partnership, any substitution or change in the general partner or general partners holding a fifty percent (50%) or greater interest in Tenant.

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 2

Tenant shall not, directly or indirectly, have the right to assign this lease or to sublet the whole or any part of the Premises without the prior written consent of Landlord which consent shall not be unreasonably withheld, conditioned or delayed. Factors which the Landlord may reasonably consider shall include, without limitation, the following:

(a) the identity of the proposed assignee or subtenant, the nature of its business, its experience in such business and its proposed use of the Premises that in each case is in keeping with the standards of a comparable quality warehouse/industrial park in the vicinity of the Project;

(b) the financial condition and creditworthiness of the proposed assignee or subtenant (taking into consideration the obligations of the assignee or subtenant under the applicable assignment or sublease agreement) that is reasonably satisfactory to Landlord taking into consideration the obligations under the applicable sublease or assignment agreement;

(c) whether or not the proposed assignee or subtenant is engaged in a business or activity, and whether or not the Premises will be used in a manner, which (i) is in keeping with the then standards of the Building, (ii) limits use of the Premises to the permitted use hereunder, and (iii) does not violate any restrictions set forth in the Lease, any mortgage or any instrument of record (unless approval thereof has been obtained);

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(d) the proposed assignee or subtenant is a reputable company with sufficient financial means to perform all of its obligations under the Lease or sublease, as the case may be, that is reasonably satisfactory to Landlord taking into consideration the obligations under the applicable sublease or assignment agreement, and if requested Landlord has been furnished with reasonable proof thereof, and neither Landlord nor any affiliate of Landlord is litigating against or has been threatened with litigation by such proposed assignee or subtenant or its affiliates within the prior twelve (12) months;

(e) the proposed assignee or subtenant is not a current tenant or occupant of the Building;

(f) the proposed assignee or subtenant is not a person or entity with whom Landlord or Landlord's agent is then, or has been within the prior six (6) months, actively negotiating in connection with the rental of space in the Building;

(g) the proposed assignee or subtenant shall not be entitled, directly or indirectly, to diplomatic or sovereign immunity unless the proposed assignee or subtenant agrees to waive such diplomatic or sovereign immunity, and shall be subject to the service of process in, and the jurisdiction of the courts of, the State of Florida;

(h) the proposed assignee or subtenant is not an entity organized under the law of any jurisdiction other than the United States or any state thereof or is not a United States citizen, if an individual; and

(i) the proposed assignee or subtenant shall not be of a type or character, or engaged in the business or activity, or owned or controlled by or identified with any entity which may result in protests or civil disorders or commotions or other disruptions of the normal business activities at the Premises, all in Landlord's reasonable opinion.

Consent to any assignment or sublease shall not be deemed a waiver of the right of Landlord to approve or disapprove a further assignment or subletting. Notwithstanding any permitted assignment or subletting, Tenant shall at all times remain directly, primarily and fully responsible and liable for the payment of the rent herein specified and for compliance with all of its other obligations under the terms, provisions and covenants of this lease. Upon the occurrence of an "event of default", as hereinafter defined, if the Premises or any part thereof are then assigned or sublet, Landlord, in addition to any other remedies herein provided, or provided by law, may at its option collect directly from such assignee or subtenant all rents becoming due to Tenant under such assignment or sublease and apply such rent against any sums due to Landlord from Tenant hereunder, and no such collection shall be construed to constitute a novation or a release of Tenant from the further performance of Tenant's obligations hereunder. For purposes of this Paragraph 14, each of the following events shall be deemed an assignment:

(i) if Tenant is a partnership, a dissolution of the partnership or a change in ownership, legal or beneficial, of 50% or more of the partnership interests, whether by withdrawal or admission, voluntary or by operation of law;

(ii) if Tenant is a corporation, the dissolution, consolidation or merger of Tenant or the sale or transfer of more than 50% of the voting shares of Tenant;

(iii) distribution or sale of over 50% of the value of Tenant's assets (net of undistributed consideration received); or

(iv) any other change of effective control of Tenant.

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In the event that Tenant assigns this Lease or sublets the Premises or any part thereof, as permitted herein, and at any time receives rent and/or other consideration in connection with such assignment or sublease which exceeds that which Tenant would at that time be obligated to pay Landlord, Tenant shall pay to Landlord 50% of the net excess in such rent as such rent is received by Tenant and 50% of any other consideration in connection with such assignment or sublease received by Tenant from such assignee or subtenant. If an assignment or subletting is approved, Tenant shall be entitled to deduct from any excess proceeds described in this subparagraph 14.B. its reasonable expenses incurred in connection with such assignment or subletting including, without limitation, all brokerage commissions and fees paid to any real estate broker or finder who is unaffiliated with Tenant in connection with the assignment or subletting, tenant improvements, concessions and legal fees associated with such assignment or subletting.

In addition, should Tenant request Landlord's consent to an assignment or sublease agreement, Tenant will pay to Landlord within thirty (30) days after presentation to Tenant of Landlord's statement setting forth the amount due accompanied by reasonable supporting documentation a sum equal to all Landlord's reasonable costs, including reasonable attorney's fees, incurred in connection with such assignment or transfer (not to exceed Two Thousand Five Hundred Dollars ($2,500.00) in the aggregate for such costs).

Notwithstanding the foregoing, Tenant may assign this Lease or sublet all or part of the Premises without Landlord's consent to one of the following entities in connection with one of the following (each, hereinafter referred to as a "Permitted Transferee"): (i) to any corporation or other entity that controls, is controlled by or is under, control with, Tenant or Tenant's parent company; (ii) to any corporation or other entity resulting from a merger, acquisition, consolidation or reorganization of or with Tenant; or (iii) in connection with the sale of all or substantially all of the assets of Tenant, so long as Tenant provides evidence to Landlord in writing that such assignment or sublease complies with the criteria set forth in (i), (ii) or (iii) above.

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Fernandez v. Vazquez, 397 So.2d 1171 (1981)
21 A.L.R.4th 181

KeyCite Yellow Flag - Negative Treatment
Disagreed With by First Federal Sav. Bank of Indiana v. Key Markets, Inc., Ind., September 10, 1990

397 So.2d 1171
District Court of Appeal of Florida, Third District.

Jose A. FERNANDEZ and
Hialeah Bakery, Inc., Appellants,
v.
Oscar VAZQUEZ and Filiberto Portales
d/b/a Job Development, Appellees.

No. 80-1451.
|
April 28, 1981.

Lessees appealed from an order of summary judgment of the Circuit Court, Dade County, Stuart M. Simons, J., dismissing their counterclaim against lessors. The District Court of Appeal, Ferguson, J., held that lessor may not arbitrarily refuse consent to assignment of commercial lease which provides, even without limiting language, that lessee shall not assign or sublease premises without written consent of lessor.

Reversed and remanded.

West Headnotes (5)

[1] **Landlord and Tenant**
Good faith and fair dealing

Lease is contract and, as such, should be governed by general contract principles of good faith and commercial reasonableness.

6 Cases that cite this headnote

[2] **Contracts**
Terms implied as part of contract

Contracts
Performance prevented by other party or third person

Established contract principle is that party's good-faith cooperation is an implied condition precedent to performance of contract; where that cooperation is unreasonably withheld, recalcitrant party is estopped from availing herself of her own wrongdoing.

18 Cases that cite this headnote

[3] **Landlord and Tenant**
Reasonableness

Lessor may not arbitrarily refuse consent to assignment of commercial lease which provides, even without limiting language, that lessee shall not assign or sublease premises without written consent of lessor; withholding of consent to assign lease, which fails test of good faith and commercial reasonableness, constitutes breach of lease agreement.

28 Cases that cite this headnote

[4] **Landlord and Tenant**
Questions of law or fact

Whether landlord breached lease by acting unreasonably in withholding consent to assign lease of commercial tenant is to be determined by jury according to facts of case.

20 Cases that cite this headnote

[5] **Landlord and Tenant**
Reasonableness

Factors which jury may properly consider in applying standards of good faith and commercial reasonableness to determine whether landlord breached lease by acting unreasonably in withholding consent to assignment of lease are financial responsibility of proposed subtenants, identity or business character of subtenant, that is, suitability for particular building, need for alteration of premises, legality of proposed use, and nature of occupancy.

31 Cases that cite this headnote

Attorneys and Law Firms

*1171 Arango & Galarraga and Jorge Sanchez-Galarraga, Coral Gables, for appellants.

Taylor, Brion, Buker & Greene and Arnaldo Velez and Maria C. Arriola Velez, Miami, for appellees.

Before HENDRY, SCHWARTZ and FERGUSON, JJ.

Opinion

FERGUSON, Judge.

Lessees, Jose Fernandez and Hialeah Bakery, Inc., appeal from an order of summary judgment dismissing their counterclaim against lessors, Oscar Vazquez and Filiberto Portales, doing business as Job Development. The issue on appeal is whether a lessor may arbitrarily refuse consent to an assignment of a lease which provides that the lessee shall not assign or sublease the premises without written consent of the lessor. We have been unable to find any case in Florida where this issue has been squarely presented to the court. The very able trial judge granted the summary judgment based on what the state of the law was assumed to be. [1]

***1172** On March 1, 1976, Fernandez and Hialeah Bakery entered into a five-year business lease with Leonard and Shirley Groh, then the owners of the property. Paragraph one of the lease provides that the lessee shall not assign the lease, nor sublet the premises without the written consent of the lessor.

On July 27, 1978, Vazquez and Portales purchased the property from the Grohs and became the new lessors. On July 17, 1978, lessees Fernandez and Hialeah Bakery entered into a written contract to sell the bakery shop to Rubin Gonzalez, a defendant below. Lessors refused to consent to this assignment. Subsequently, on August 21, 1978, Vazquez and Portales offered to approve Gonzalez under a new lease if he would pay an additional rent of $250 a month. Since Gonzalez was not interested in acquiring the business under the increased rent and since Vazquez and Portales would not otherwise consent to the assignment, the purchase and sale contract between Gonzalez and lessees was rescinded. Hialeah Bakery remained in possession of the premises.

On August 30, 1978, Vazquez and Portales filed suit against Fernandez and Hialeah Bakery seeking to cancel the lease for untimely payment of the August 1978 rent installment and to evict Fernandez, Hialeah Bakery, and Gonzalez from the premises. Fernandez and Hialeah Bakery counterclaimed alleging lessors breached the lease agreement by refusing to consent to the assignment. Vazquez and Portales filed a motion for summary judgment as to the counterclaim, which was granted by the trial judge.

The law generally favors free alienation of property and under common law a tenant has the right to assign his leasehold interest without the consent of the lessor. See Frissell v. Nichols, 94 Fla. 403, 114 So. 431 (1927); 3A R. Thompson, Real Property, s 1200 (J. Grimes, 1981). In order to protect the landlord from this common law right of assignment, many leases expressly provide that the property cannot be assigned without the written consent of the landlord. A decreasing majority of jurisdictions hold that when such written consent is required, a landlord may arbitrarily and capriciously refuse to approve a subtenant or assignee. [2] See B & R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt.1980); Carleno v. Vollmert Tire Co., 36 Colo.App. 446, 540 P.2d 1149 (1975); Segre v. Ring, 103 N.H. 278, 170 A.2d 265 (1961); Grumen v. Investor's Diversified Services, 247 Minn. 502, 78 N.W.2d 377 (1956). [3] See ***1173** also 49 Am.Jur.2d, Landlord and Tenant, s 423; 51C C.J.S., Landlord and Tenant s 36(1); Annot. 31 A.L.R.2d 821 (1953).

The arbitrary and capricious rule is undergoing continued erosion. An increasing number of jurisdictions hold that when a lease requires written consent prior to assignment or subleasing, but does not contain any language limiting the withholding of that consent, such consent may not be arbitrarily or unreasonably refused. Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035 (Ala. 1977); Arrington v. Walter E. Heller International Corp., 30 Ill.App.3d 631, 333 N.E.2d 50 (1975); Shaker Building Co. v. Federal Lime and Stone Co., 28 Ohio Misc. 246, 277 N.E.2d 584 (1971). See Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (N.J. 1977) (residential lease requiring written consent of landlord), holding that a landlord has the duty to mitigate damages. At least three states, Alaska, [4] Delaware, [5] and New York, [6] have prohibited a landlord from arbitrarily refusing consent in cases involving residential leases. See also Restatement (Second) Property, Landlord and Tenant, s 15.12 (1977); Weissenberger, "The Landlord's Duty to Mitigate Damages on the Tenant's Abandonment: A Survey of Old Law and New Trends," 53 Temp.L.Q. 1 (1980).

[1] **[2]** Underlying the cases abolishing the arbitrary and capricious rule is the now well-accepted concept that a lease is a contract [7] and, as such, should be governed by ***1174** the general contract principles of good faith and commercial reasonableness. One established contract

principle is that a party's good faith cooperation is an implied condition precedent to performance of a contract. Where that cooperation is unreasonably withheld, the recalcitrant party is estopped from availing herself of her own wrongdoing. Dade County v. O.K. Auto Parts of Miami, Inc., 360 So.2d 441 (Fla.3d DCA 1978), cert. denied, 379 So.2d 207 (Fla., 1979). See also Zim v. Western Publishing Co., 573 F.2d 1318, 1324 (5th Cir. 1978); Knowles v. Henderson, 156 Fla. 31, 22 So.2d 384 (1945); Hart v. Pierce, 98 Fla. 1087, 125 So. 243 (1929); Paul v. Hurley, 315 So.2d 536 (Fla. 4th DCA 1975); Casale v. Carrigan and Boland, Inc., 288 So.2d 299 (Fla. 4th DCA 1974); 3 A. Corbin, Contracts, ss 767, 768 (1960); 5 Williston Contracts, ss 676, 677 (3d ed. Jaeger 1972).

Where a lessee is entitled to sublet under common law, but has agreed to limit that right by first acquiring the consent of the landlord, we believe the lessee has a right to expect that consent will not be unreasonably withheld. We cite with approval the rationale of the courts in Homa-Goff, supra 350 So.2d at 1038 and Arrington, supra 30 Ill.App.3d 631, 333 N.E.2d at 58:

> Where the lease merely contains a provision without more granting a person, normally a landlord, the power to withhold consent, regardless of whether explicitly qualified to reasonable exercises of the power ... the courts have held the person's refusal to consent to a person acceptable by reasonable commercial standards to be an unreasonable exercise and thus violative of the lease.

[3] **[4]** **[5]** Accordingly, we hold that a lessor may not arbitrarily refuse consent to an assignment of a commercial lease which provides, even without limiting language, that a lessee shall not assign or sublease the premises without the written consent of the lessor. [8] A withholding of consent to assign a lease, which fails the tests for good faith and commercial reasonableness, constitutes a breach of the lease agreement. Whether a landlord breached the lease by acting unreasonably in withholding consent of a commercial tenant is to be determined by a jury according to the facts of that case. The following factors are among those which a jury may properly consider in applying the standards of good faith and commercial reasonableness: (a) financial responsibility of the proposed subtenant (b) the "identity" or "business character" of the subtenant, i. e., suitability for the particular building, (c) the need for alteration of the premises, (d) the legality of the proposed use, and (e) the nature of the occupancy, i. e., office, factory, clinic, etc.; See Popovic v. Florida Mechanical Contractors, supra, Whitman v. Pet Inc., supra, American Book Co. v. Yeshiva University, Development Foundation, Inc., 59 Misc.2d 31, 297 N.Y.S.2d 156 (1969); Johnson v. Jaquith, supra. Denying consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for have been held arbitrary reasons failing the tests of good faith and reasonableness under commercial leases. Catalina Inc. v. Biscayne Northeast Corp., supra; Chanslor Western Oil & Development Co. v. Metropolitan Sanitary District, 131 Ill.App.2d 527, 266 N.E.2d 405 (1970), citing Broad and Branford Place Corp. v. J. J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80, 82 (1944).

Reversed and remanded for further proceedings consistent with this opinion.

All Citations

397 So.2d 1171, 21 A.L.R.4th 181

Footnotes

1 See Lane v. Floridus Enterprises, Inc., 391 So.2d 270 (Fla. 4th DCA 1980), Glickstein, J., dissenting: "Whether the conduct of the lessor's representative was reasonable is not an issue because in my judgment when a lease requires the consent of the lessor to any assignment and the lease does not contain limiting language requiring a reasonable withholding thereof, the lessor may refuse or decline to give such consent for any or no reason." Id. at 272.
See also Tallahassee Mall, Inc. v. Rogers, 352 So.2d 1272 (Fla. 1st DCA 1977). The primary issue is whether appellant unreasonably withheld consent. There is no indication in the opinion if the lease contained language limiting the refusal.

2 The arbitrary and capricious rule does not apply where (a) the lease specifically provides that consent may not be unreasonably withheld, Popovic v. Florida Mechanical Contractors, Inc., 358 So.2d 880 (Fla.2d DCA 1978); Whitman v. Pet Inc., 335 So.2d 577 (Fla.3d DCA 1976); Catalina, Inc. v. Biscayne Northeast Corp. of Florida, 296 So.2d 580 (Fla.3d DCA 1974); Johnson v. Jaquith, 189 So.2d 827 (Fla.4th DCA 1966); or (b) the lessor has waived the right to withhold consent by accepting benefits, Crossman v. Fountainebleau Hotel Corp., 273 F.2d 720 (5th Cir. 1959); Barber v. Hatch,

380 So.2d 536 (Fla.5th DCA 1980); Gould v. Ruzakowski, 345 So.2d 842 (Fla.3d DCA 1977); Leeds Shoes, Inc. v. Wally, 309 So.2d 249 (Fla.4th DCA 1975); Tollius v. Dutch Inns of America, Inc., 244 So.2d 467 (Fla.3d DCA 1970). See Annot. 54 A.L.R.3d 679 (1973).

3 The court in Grumen, supra, lists the following nineteen jurisdictions as permitting arbitrary refusal: District of Columbia, Alabama, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, and Texas. Since this case was decided, at least five of the states (Alabama, Illinois, New Jersey, New York and Ohio) have changed their laws. Massachusetts remains with the majority but not without protest. See Granite Trust Building Corp. v. Great Atlantic & Pacific Tea Co., 36 F.Supp. 77, 78 (D.C. Mass. 1940) ("It would seem to be the better law that when a lease restricts a lessee's rights by requiring consent before these rights can be exercised, it must have been in the contemplation of the parties that the lessor be required to give some reason for withholding consent); Edmands v. Rust & Richardson Drug Co., 191 Mass. 123, 77 N.E. 713 (1906) (landlord may not hold tenant responsible for damages if he refuses to accept financially responsible tenant); Ablondi v. Chase, 11 Mass.App. 902, 414 N.E.2d 617 (1981) (but lease may contain limiting language). The Florida case cited in Grumen, supra, does not necessarily support this position. See Williams v. Aeroland Oil Co., 155 Fla. 114, 20 So.2d 346 (1944).

4 Alaska Statutes, Section 34.030.060 (1975):

> (b) The tenant's right to sublease his premises or assign the rental agreement to another shall be conditioned on obtaining the landlord's consent, which may be withheld only upon the grounds specified in (d) of this section; no further restrictions on sublease or assignment are enforceable...
>
> (d) With 14 days after the written offer has been delivered to the landlord, the landlord may refuse consent to a sublease or assignment by a written rejection signed and delivered by him to the tenant, containing one or more of the following reasonable grounds for rejecting the prospective occupant:
>
> (1) insufficient credit standing or financial responsibility;
>
> (2) number of persons in the household;
>
> (3) number of persons under 18 years of age in the household;
>
> (4) unwillingness of the prospective occupant to assume the same terms as are included in the existing rental agreement;
>
> (5) proposed maintenance of pets;
>
> (6) proposed commercial activity; or
>
> (7) written information signed by a previous landlord, which shall accompany the rejection, setting out abuses of other premises occupied by the prospective occupant.

5 Delaware Code Annotated Tit. 25, s 5512(b) (1974):

> The rental agreement may restrict the tenant's right to assign the rental agreement in any manner. The tenant's right to sublease the premises may be conditioned on obtaining the landlord's consent, which shall not be unreasonably withheld. No consideration of race, creed, sex, marital status, religion, political opinion, or affiliation or national origin may be relied on by the landlord as reasonable grounds for rejection.

6 New York Real Property s 226-b (49 McKinney's Supp. 1980-81);

> 1. A tenant renting a residence in a dwelling having four or more residential units shall have the right to sublease or assign his premises, subject to the written consent of the landlord given in advance of the sublease or assignment. Such consent shall not be unreasonably withheld. If the landlord unreasonably withholds consent for such sublease or assignment, the landlord must release the tenant from the lease upon request of the tenant.

7 For other jurisdictions, see 2 R. Powell, Real Property s 221(1) (Rohan ed. 1977); 3 R. Thompson, Real Property, s 1110 (J. Grimes 1980); Javins v. First National Realty Co., 428 F.2d 1071 (D.C. Cir. 1970), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970); Sommer v. Kridel, supra, Parkwood Realty Co. v. Marcano, 77 Misc.2d 690, 353 N.Y.S.2d 623 (1974); 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc.2d 353, 335 N.Y.S.2d 872 (App.Div. 1972); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Wright v. Baumann, 239 Or. 410, 398 P.2d 119 (1965). For Florida see, R. Boyer, 2 Florida Real Estate Transactions, ss 35.01-02 (1980); Uniform Residential Landlord and Tenant Act, s 83.44, Fla.Stat. (1979), Butler v. Maney, 146 Fla. 33, 36, 200 So. 226, 228 (1941).

8 Although we see no significant difference between a residential lease and a commercial lease as to the obligations of good faith and commercial reasonableness, we are presented only with a business lease and, therefore, adopt the narrow holding. We are not presented with and make no ruling on the general duty of a landlord to mitigate damages under Florida law.

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966 So.2d 1
District Court of Appeal of Florida,
Second District.

SPEEDWAY SUPERAMERICA, LLC, Appellant,
v.
TROPIC ENTERPRISES, INC.,
Sunoco, Inc. (R & M), and Mascot
Petroleum Company, Inc., Appellees.
Sunoco, Inc. (R & M) and Mascot
Petroleum Company, Inc., Appellants,
v.
Tropic Enterprises, Inc., and Speedway
SuperAmerica, LLC, Appellees.

Nos. 2D05–2207, 2D05–2209.
|
April 20, 2007.
|
Rehearing Denied June 25, 2007.

Synopsis

Background: Tenant filed action challenging landlord's refusal to grant consent to assignment of a commercial lease. The Circuit Court, Sarasota County, Deno G. Economou, J., entered summary judgment in favor of landlord, finding landlord had unfettered right under lease to withhold its consent to assignment, and held that landlord was entitled to regain possession of leasehold property. Tenant appealed.

[Holding:] The District Court of Appeal, Canady, J., held that lease provision governing assignments was subject to implied covenant of good faith.

Reversed and remanded.

West Headnotes (5)

[1] **Landlord and Tenant**
Transfer of cause

The fact that the order granting summary judgment was itself not an appealable order did not divest District Court of Appeal of jurisdiction to consider an error in the summary judgment order that provided the basis for the order directing issuance of the writ of possession for commercial property.

1 Cases that cite this headnote

[2] **Courts**
Previous Decisions as Controlling or as Precedents

No decision is authority on any question not raised and considered, although it may be involved in the facts of the case.

Cases that cite this headnote

[3] **Contracts**
Terms implied as part of contract

The implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations.

20 Cases that cite this headnote

[4] **Contracts**
Scope and extent of obligation

Where the terms of the contract afford a party substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party.

12 Cases that cite this headnote

[5] **Landlord and Tenant**
Consent of Lessor, and Waiver Thereof
Landlord and Tenant
Good faith and fair dealing

Commercial lease provision governing assignments, which simply required prior written consent of landlord to any assignment, was subject to implied covenant of good faith; provision contained no standards for exercising discretion by landlord nor did it state that landlord's discretion to withhold consent was absolute.

11 Cases that cite this headnote

Attorneys and Law Firms

*1 Kenneth J. Plante of Roetzel & Andress, L.P.A., Tallahassee, and Clayton W. Crevasse of Roetzel & Andress, L.P.A., Fort Myers, for Speedway SuperAmerica, LLC.

Jennifer S. Eden and Deborah B. Ansbro of Gronek & Latham, LLP, Orlando, for Sunoco, Inc. (R & M) and Mascot Petroleum Co., Inc.

Christopher J. Greene of Brant, Abraham, Reiter, McCormick & Greene, P.A., Jacksonville, and David S. Maglich of Fergeson, Skipper, Shaw, Keyser, Baron *2 & Tirabassi, P.A., Sarasota, for Tropic Enterprises, Inc.

Opinion

CANADY, Judge.

In this consolidated appeal, we consider a dispute arising from a landlord's refusal to grant consent to the assignment of a commercial lease. The trial court determined that the landlord, Tropic Enterprises, Inc., had an unfettered right under the lease to withhold its consent to the assignment of the lease made by the tenant, Speedway SuperAmerica, LLC, to the assignee, Sunoco, Inc. (R & M). Because we conclude that the trial court erred in making that determination, we reverse.

[1] The order on appeal is an order directing the issuance of a writ of possession to Tropic, which is subject to interlocutory review as an order that determines "the right to immediate possession of property." Fla. R.App. P. 9.130(a)(3)(C)(ii). In reviewing this order we are required to consider the basis for the entry of the order. That basis is reflected in the trial court's order granting Tropic's motion for summary judgment. [1]

The trial court's order granting summary judgment to Tropic made the critical ruling that the assignment by Speedway to Sunoco was invalid because Tropic had refused to provide the written consent to the assignment of the lease, which was requested by Speedway. The trial court thus determined that the assignment constituted a breach of the lease by Speedway, that Tropic was entitled to regain possession of the leasehold property, and that Sunoco and its affiliate, Mascot Petroleum Company, Inc., were wrongfully in possession of the property.

In determining that Tropic had the unfettered right to deny its consent to the assignment of the lease, the trial court relied on the following provision of the lease:

> Lessee shall not assign or transfer this lease, or any interest therein, without the prior written consent of Lessor, and a consent to an assignment shall not be deemed a consent to any subsequent assignment. Any such assignment without consent shall be void, and shall, at the option of the Lessor, terminate this lease.

Sunoco, Mascot, and Speedway argued to the trial court that Tropic's right of consent under this lease provision was not absolute but was subject to an implied obligation not to arbitrarily deny consent. In rejecting that argument, the trial court relied on the decision of the Florida Supreme Court in *Anderson v. Tower Amusement Co.*, 120 Fla. 476, 163 So. 11 (1935). The trial court understood *Tower Amusement* to hold that a landlord cannot be subject to an implied duty not to arbitrarily deny consent to an assignment. The trial court concluded that since it was "undisputed" that Tropic "did not give written consent to the assignment of this lease," Tropic was entitled to judgment as a matter of law.

On appeal, Speedway, Sunoco, and Mascot contend that the trial court's reliance on *Tower Amusement* was misplaced and that because there were disputed issues of fact concerning the reasonableness of Tropic's denial of consent, summary judgment was not warranted. The correctness of the order on appeal turns on whether the trial court properly understood the decision in *Tower Amusement.*

*3 In *Tower Amusement,* the trial court rejected a claim for injunctive relief by the landlords against a purported assignee of the leasehold. The supreme court concluded that the trial court had erred because "under the terms of the lease an assignment thereof could only be made with the written consent of the lessors thereunto formally given" and the "record fail [ed] to show that such written consent was given by the lessors." 163 So. at 13. The court noted with respect to the lease provision concerning assignment that although "[t]he language used is somewhat ambiguous," "the construction placed on the lease by all of the parties to the lease" "was that the lessee should not underlet or rent the premises or transfer the lease without the written consent of the lessors." *Id.*

[2] In *Tower Amusement,* no one argued that there was an implied obligation governing the exercise of the landlord's rights with respect to assignments. That issue was not presented to the court, and it was not decided by the court. The holding of *Tower Amusement* therefore does not address whether such an implied obligation might arise. "[N]o decision is authority on any question not raised and considered, although it may be involved in the facts of the case." *State ex rel. Helseth v. Du Bose,* 99 Fla. 812, 128 So. 4, 6 (1930); *see also Twyman v. Roell,* 123 Fla. 2, 166 So. 215, 217 (1936) ("To be of value as a precedent, the questions raised by the pleadings and adjudicated in the case cited as a precedent must be [o]n point with those presented in the case at bar."). Accordingly, the trial court's reliance on *Tower Amusement* was unjustified.

We have stated that "[t]he implied covenant of good faith exists in virtually all contractual relationships." *Sepe v. City of Safety Harbor,* 761 So.2d 1182, 1184 (Fla. 2d DCA 2000); *see also County of Brevard v. Miorelli Eng'g, Inc.,* 703 So.2d 1049, 1050 (Fla.1997) (" '[E]very contract includes an implied covenant that the parties will perform in good faith.' " (quoting *Champagne–Webber, Inc. v. City of Fort Lauderdale,* 519 So.2d 696, 697 (Fla. 4th DCA 1988))); Restatement (Second) of Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

[3] **[4]** Despite broad characterizations of the implied covenant of good faith, we have recognized that it "is a gap-filling default rule," which comes into play "when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." *Publix Super Markets, Inc. v. Wilder Corp. of Del.,* 876 So.2d 652, 654 (Fla. 2d DCA 2004). "[T]he implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations." *Cox v. CSX Intermodal, Inc.,* 732 So.2d 1092, 1097 (Fla. 1st DCA 1999). "[W]here the terms of the contract afford a party substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party." *Id.* at 1097–98.[2]

***4** The implied obligation of good faith performance has been applied in the context of lease provisions requiring a landlord's consent to a tenant's assignment of a lease. In *Fernandez v. Vazquez,* 397 So.2d 1171, 1173–74 (Fla. 3d DCA 1981) (footnote omitted), the court recognized the "well-accepted concept that a lease is a contract and, as such, should be governed by the general contract principles of good faith and commercial reasonableness."[3]

The *Fernandez* court considered a commercial lease providing "that the lessee shall not assign the lease, nor sublet the premises[,] without the written consent of the lessor," *id.* at 1172, where the landlord refused consent to an assignment but offered to enter a new lease with the proposed assignee with an increased monthly rental. The court held:

> [A] lessor may not arbitrarily refuse consent to an assignment of a commercial lease which provides ... that a lessee shall not assign or sublease the premises without the written consent of the lessor. A withholding of consent to assign a lease, which fails the tests for good faith and commercial reasonableness, constitutes a breach of the lease agreement. Whether a landlord breached the lease by acting unreasonably in withholding consent of a commercial tenant is to be determined by a jury according to the facts of that case.

Id. at 1174 (footnote omitted); *see also* Restatement (Second) of Property: Landlord Tenant 15.2(2) (1977) (stating that "the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent").

The *Fernandez* court went on to enumerate various factors that may be considered in determining whether the withholding of consent is arbitrary: "(a) financial responsibility of the proposed subtenant[,] (b) the 'identity' or 'business character' of the subtenant, i.e., suitability for the particular building, (c) the need for alteration of the premises, (d) the legality of the proposed use, and (e) the nature of the occupancy, i.e., office, factory, clinic, etc." 397 So.2d at 1174. Finally, the *Fernandez* court made this observation: "Denying consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for have been held arbitrary reasons failing the tests of good faith and reasonableness under commercial leases." *Id.*

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[5] In the instant case, the lease provision governing assignments simply requires the "prior written consent of Lessor" to any assignment. The provision ***5** contains "no standards for exercising discretion" by the landlord. *Wilder Corp. of Del.*, 876 So.2d at 655. Nor does the provision state that the landlord's discretion to withhold consent is absolute. The provision presents a circumstance in which "one party has the power to make a discretionary decision without defined standards," *id.* at 654, a circumstance in which a "covenant of good faith" will be "implied" to "protect [ ][the] contracting parties' reasonable commercial expectations," *id.* at 655. The trial court therefore erred in concluding that the lease granted Tropic the unfettered right to deny consent to the assignment by Speedway to Sunoco.

We therefore reverse the order on appeal and remand for further proceedings.

FULMER, C.J., and DAVIS, J., concur.

All Citations

966 So.2d 1, 32 Fla. L. Weekly D1032

Footnotes

1 The fact that the order granting summary judgment is itself not an appealable order does not divest us of jurisdiction to consider an error in the summary judgment order that provided the basis for the order directing issuance of the writ of possession.

2 When properly applied, the implied covenant of good faith gives effect to the reasonable expectations of the contracting parties. Application of the implied duty in a way that defeats the contractual terms agreed to by the contracting parties has been criticized:

> Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of good faith[.] Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document. Good faith is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties. When the contract is silent, principles of good faith ... fill the gap. They do not block use of terms that actually appear in the contract.

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir.1990) (citations omitted); *see also Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1438 (S.D.Fla.1996) (The implied covenant of good faith should not be invoked to override the express terms of the agreement between the parties.).

3 Our decision in *Natural Kitchen, Inc. v. American Transworld Corp.*, 449 So.2d 855, 858 (Fla. 2d DCA 1984), dealt with issues related to a landlord's refusal to consent to a lease assignment, but we specifically "noted that the unreasonableness of [the landlord] in refusing to consent to the assignment of the lease [was] not an issue on this appeal."

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PRINCIPLES OF COMMERCIAL LEASING

2. LEASING AS OPPOSED TO BUYING AFFORDS A TENANT FLEXIBILITY.

Discussion:

- One of the reasons tenants lease instead of buy is to maintain flexibility. There are other important reasons but this is an important one. The tenant's business plan may include the possibility of changes that will necessitate growth. That may require expansion options. If the landlord cannot accommodate that growth, the tenant needs to move somewhere else which may require a termination option.

- What about a tenant who may need to move to get business from another landlord. For example, if an architectural firm can get business from a developer who may be building a new office building, they may want a termination option so they can move to the office building being constructed by their office developer client.

- What about a real estate brokerage firm that gets the leasing and management work for an office building. They may want a termination option so that they can keep that work. They may get that work from another landlord if they move. They need a termination option.

- What about a tenant with multiple business units within their premises. If one becomes unprofitable, they may want a contraction option.

- What about a retail tenant; that is extremely location driven. They invest heavily in the marketing of that location and they need to remain close to the customer base that they have developed. They must have renewal options.
- What about a tenant who profits from being next door to another tenant. We will not cover co-tenancy provisions but this sort of flexibility is important to that kind of tenant. If he wants to be next to Wal-Mart and Wal-Mart closes, he may want to move on.
- These options that create this flexibility come at a price, but the price may pale in comparison to the benefits.

Attachments:
Sample – Right of First Refusal
Sample – Right of First Offer
Sample – Expansion Option
Sample – Option to Extend/Renewal Option
Sample – Termination Option
Sample – Contraction Right

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 1

RIGHT OF FIRST REFUSAL

Right of First Refusal. Landlord grants Tenant a one-time right of first refusal (the "Right of First Refusal") to lease any space adjacent to the Premises ("ROFR Space") on the following basis:

A. Tenant has _____ (____) business days after being notified by Landlord of Landlord's desire to lease the ROFR Space ("Landlord's Offer Notice") within which to give Landlord its notice of its election to exercise its Right of First Refusal as to such space ("Tenant Offer Notice"). Tenant's Right of First Refusal is subordinate to all rights of extension, expansion, or first offer or refusal as to the ROFR Space in favor of other tenants in the Building in place as of the date of this Lease. Landlord will determine the exact square footage of the ROFR Space in accordance with subparagraph E below at the time such space or any portion thereof is offered to Tenant. Tenant must lease all of the ROFR Space offered by Landlord (the "Offered Space") and not only a portion thereof.

B. If Tenant does not timely give notice to Landlord, it will be conclusively presumed that Tenant has waived its Right of First Refusal, Landlord shall be free to lease the ROFR Space to anyone to whom it desires and Tenant will have no further rights to the ROFR Space.

C. The ROFR Space will be offered to Tenant on the terms in Landlord's Offer Notice. After exercise of the Right of First Refusal, the parties will execute an amendment to the Lease evidencing the addition of such space.

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D. Unless expressly waived by Landlord, Tenant's Right of First Refusal is conditioned on: (i) Tenant not being in default beyond any applicable cure or grace period under the Lease at the time of exercise of the Right of Offer or on the date that Tenant's occupancy of the Offered Space is scheduled to commence; (ii) Tenant not having vacated or subleased the Premises or assigned its interest in the Lease at the time it exercises the Right of First Refusal or on the date that Tenant's occupancy of the Offered Space is scheduled to commence; and (iii) there being at least three (3) years remaining in the Term. Notwithstanding the foregoing, if there are less than three (3) years remaining in the Term but the Right of First Refusal would otherwise be available to Tenant and an option to extend the Term is available to Tenant hereunder, Tenant may exercise the Right of First Refusal provided Tenant simultaneously exercises its option to extend the Term of the Lease. Tenant's rights pursuant to this paragraph are personal and upon an assignment of the Lease, this paragraph is null and void.

E. If Landlord's Offer Notice states that Landlord is in lease negotiations with a third party for space which is greater than but includes the ROFR Space, then to exercise the Right of First Refusal, Tenant must lease space the third party would lease under such negotiations.

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 2

RIGHT OF FIRST OFFER

Right of Offer. Landlord grants Tenant a one-time right of offer (the "Right of Offer") to lease approximately _____ rentable square feet of space on the _____ floor of the Building [contiguous to the Premises] or [located in Suite ____] (the "Right of Offer Space") as depicted on Exhibit __ attached hereto on the following basis:

A. Tenant has _____ hours [48 hours] after being notified by Landlord of Landlord's desire to lease the Right of Offer Space ("Landlord's Offer Notice") within which to give Landlord its notice of its election to exercise its Right of Offer as to such space ("Tenant Offer Notice"). Tenant's Right of Offer is subordinate to all rights of extension, expansion, or first offer or refusal as to the Right of Offer Space in favor of other tenants in the Building in place as of the date of this Lease. Landlord will determine the exact square footage of the Right of Offer Space in accordance with subparagraph E below at the time such space or any portion thereof is offered to Tenant. Tenant must lease all of the Right of Offer Space offered by Landlord (the "Offered Space") and not only a portion thereof.

B. If Tenant does not timely give notice to Landlord, it will be conclusively presumed that Tenant has waived its Right of Offer, Landlord shall be free to lease the Right of Offer Space to anyone whom it desires and Tenant will have no further rights to the Right of Offer Space.

C. The Right of Offer Space will be offered to Tenant for a term and upon the provisions and at the Base Rent rate Landlord would offer to lease the Right of Offer Space to third parties. Such provisions will include, among other things, a base for Additional Rent and allowances, if any. Upon exercise of the Right of Offer, the Offered Space will be deemed added to the Premises and Tenant will accept such space in its "as is" condition without any remodeling or fix-up work performed by Landlord, except as may be provided in Landlord's Offer Notice. Except as provided in Landlord's Offer Notice, all costs of preparing the Right of Offer Space, including costs of compliance with Applicable Laws, will be paid by Tenant. After exercise of the Right of Offer, the parties will execute an amendment to the Lease evidencing the addition of such space.

D. Unless expressly waived by Landlord, Tenant's Right of Offer is conditioned on: (i) Tenant not being in default under the Lease at the time of exercise of the Right of Offer or on the date that Tenant's occupancy of the Offered Space is scheduled to commence; (ii) Tenant not having vacated or subleased the Premises or assigned its interest in the Lease at the time it exercises the Right of Offer or on the date that Tenant's occupancy of the Offered Space is scheduled to commence; (iii) Tenant's financial condition not having materially adversely changed since the Effective Date and (iv) there being at least _____ years [months] remaining in the Term. Tenant's rights pursuant to this paragraph are personal and upon an assignment of the Lease, this paragraph is null and void.

E. If Landlord's Offer Notice states that Landlord is in lease negotiations with a third party for space which is greater than but includes the Right of Offer Space, then to exercise the Right of Offer, Tenant must lease space the third party would lease under such negotiations.

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 3

EXPANSION OPTION

Expansion Option. Landlord hereby grants to Tenant an option to add to the Premises (the "Expansion Option") expansion space consisting of _____ [the entirety of the ___ floor of the Building][approximately _____ rentable square feet of space as depicted on the attached Exhibit __] (the "Expansion Space") on the following basis:

A. Tenant shall give notice to Landlord of its election to exercise the Expansion Option ("Tenant's Expansion Notice") on or before _____ [not sooner than _____ nor later than _____]. If Tenant does not timely give notice to Landlord it will be conclusively presumed Tenant waives its right to exercise the Expansion Option and has no further rights to the Expansion Space; the Expansion Option shall thereupon automatically be of no further force and effect.

B. Tenant must lease all of the Expansion Space and not only a portion thereof.

C. If Tenant timely exercises the Expansion Option, the space shall be deemed added to the Premises, Landlord shall deliver the Expansion Space for anticipated occupancy by Tenant [within ___ [60] days of Tenant's notice of exercise, subject to delays beyond Landlord's reasonable control][or when Landlord has substantially completed work to be completed by Landlord] [generally in accordance with the process set forth in the Work Letter], and Tenant shall cooperate to meet such anticipated occupancy date. The Expansion Option Space shall be added upon the terms and conditions of this Lease, except (i) Tenant's Base Rent obligations for the Expansion Space shall commence on Landlord's delivery of the Expansion Space, in the amount of [$_____ per month until the first escalation increase for the

Premises under the Lease and thereafter Base Rent shall be payable at the same annual per square foot rental rate escalation in effect under the Lease for the Premises]; and (iii) the "Finish Allowance" applicable to the Expansion Space shall be [$_____ per rentable square foot of the Expansion Space] but any unused Finish Allowance shall be forfeited. All finish work shall be subject to Landlord's prior approval as set forth in the Lease. The parties shall execute an amendment to the Lease evidencing the addition of the Expansion Space.

D. Unless expressly waived by Landlord, Tenant's right to exercise the Expansion Option is conditioned on: (i) Tenant not being in default at the time of exercise or as of date the Expansion Space is added to the Lease; (ii) Tenant not having vacated or subleased the Premises or assigned its interest under the Lease as of date the Expansion Space is added to the Lease; and (iii) Tenant's financial condition not having materially adversely changed since the Effective Date. Tenant's rights pursuant to this paragraph are personal and upon an assignment of the Lease, this paragraph is null and void.

PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 4

OPTION TO EXTEND. Landlord grants Tenant an option (the "Option") to extend the term of the Lease for two (2) additional terms of five (5) years each (the "Option Terms"). Such Option applies only to the Premises and is on the following conditions:

A. Notice of Tenant's exercise of the Option must be given to Landlord no earlier than twelve (12) months and no later than one hundred eighty (180) days prior to the Expiration Date of the Term ("Tenant's Notice"). Within thirty (30) days after being given Tenant's Notice, Landlord will notify Tenant of the Base Rent applicable during the Option Term ("Landlord's Notice").

B. Tenant has thirty (30) days after having been given Landlord's Notice to dispute the rental rate quoted by Landlord by delivering notice of dispute to Landlord. In the event Tenant fails to give such written notice to Landlord within said thirty (30) day period, Tenant shall be deemed to have accepted and agreed to the rental rate set forth in Landlord's Notice and the Term will be deemed extended on the terms as set forth in Landlord's Notice and the parties will execute an amendment evidencing the extension. If Tenant timely disputes Landlord's determination of the Base Rent rate, Tenant shall give notice of such dispute ("Dispute Notice") within the thirty (30) day period and the Base Rent rate shall thereafter be determined in accordance with Paragraph E below.

C. Unless expressly waived by Landlord, Tenant's right to exercise the Option is conditioned on: (i) Tenant not being in default beyond any applicable cure or grace period at the time of exercise or at the time of commencement of the Option Term; and (ii) Tenant not having subleased or vacated the Premises or assigned its interest under the Lease (except to a Permitted Transferee) as of the commencement of the Option Term. Tenant's rights pursuant to this paragraph are personal and upon an assignment of the Lease (except to a Permitted Transferee), this paragraph is null and void.

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D. The provisions of the Lease shall be applicable during any Option Term, except that the Base Rent shall be as set forth in Landlord's Notice, unless determined in accordance with paragraph E below.

E. Following giving of Tenant's Dispute Notice, Landlord and Tenant shall promptly negotiate to determine a mutually acceptable Base Rent. If the parties mutually agree upon a new Base Rent rate, such agreed rate shall be the Base Rent rate applicable during the particular Option Term. If the parties have not agreed within 20 days after the giving of Tenant's Dispute Notice, then within such 20-day period Landlord and Tenant shall endeavor to agree upon a qualified commercial real estate broker of good reputation, having at least five (5) years' experience in the real estate market in which the Building is located, to act as arbitrator ("Arbitrator"); otherwise, they shall each select, within the foregoing 20-day period, a real estate broker who meets the above qualifications and together such brokers will then select a real estate broker who meets the above qualifications and who shall be deemed the Arbitrator. Within ten (10) days after designation of the Arbitrator, Landlord and Tenant each shall give notice of its determination of the Prevailing Market Rental Rate supported by the reasons therefor by delivering copies to each other and the Arbitrator, under an arrangement for simultaneous exchange of such determinations. The Arbitrator will review each party's determination and select the one which most accurately reflects such Arbitrator's determination of the Prevailing Market Rental Rate. Such selection shall be final and binding on both parties and shall be the Base Rent paid during the particular Option Term. The Arbitrator shall have no right to propose a middle ground or any modifications of either party's determination. The Arbitrator's costs incurred in this procedure shall be shared equally by Landlord and Tenant and shall be fixed when the Arbitrator is selected. For purposes of this paragraph, Prevailing Market Rental Rate means the annual amount per square foot that a willing tenant would pay and a willing landlord would accept for Base Rent following arms-length negotiations with respect to an Assumed Lease (defined below) under the circumstances then obtaining. Assumed Lease means (i) a lease or renewal having a commencement date within 6 months of Tenant's Notice for space of approximately the same size as the Premises, located in a portion of the Building or a Comparable Building (defined below), and with comparable

Building features, including, without limitation, the age of the Building, the clear height, the truck court depth and the sprinkler system for which Prevailing Market Rental Rate is being determined, for a term equal in length to the Option Term; (ii) a real estate commission is payable with respect to such extension to the extent a third party commission with respect to extension is agreed or obligated to be paid by Landlord; and (iii) taking into consideration and making adjustments to reflect allowances, if any, as provided in Landlord's Notice. Comparable Building means any then-existing building in a 10-mile radius of the Building that is of a size, location, quality and prestige comparable to, and with comparable Building features, including, without limitation, the age of the Building, the clear height, the truck court depth and the sprinkler system.

F. After exercise with respect to the last Option Term, or failure to exercise the Option as to any Option Term, Tenant shall have no further rights to extend the Term.

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 5

TERMINATION OPTION

Termination Option. Provided Tenant is not in default, Tenant may elect to terminate this Lease as of the last day of the ____ full month of the Initial Term (the "Termination Date"), by giving Landlord written notice ("Tenant's Notice") on or before the last day of ____ month of the Initial Term, provided that: (1) on or before the Termination Date, Tenant has paid Landlord all amounts due and owing under the Lease; and (2) Tenant pays to Landlord concurrently with Tenant's Notice a termination fee ("Fee") equal to (i) $_____ (__ months' Base Rent) plus (ii) __ months' of the then current Estimated Payments of Operating Expenses, plus (iii) $_____ (the unamortized portion of Landlord's leasing costs, including the Tenant Improvement Allowance, legal costs, and leasing commission charges, with interest thereon at the rate of ___% per annum), plus (ii) the _____ months free rent concession provided to Tenant in the amount of $_____. Tenant's right to exercise the Option is conditioned on: (i) Tenant not being in default at the time of exercise of the Option or on the Termination Date: and (ii) Tenant not having vacated or subleased the Premises or assigned its interest under the Lease as of the date of exercise of the Option or on the Termination Date. If this Option is timely exercised, Tenant will deliver possession of the Premises to Landlord on the Termination Date in accordance with the terms of the Lease and all other terms and provisions will apply as if the Lease had expired according to its terms, including Tenant's obligation for payment of Tenant's Pro Rata Share of Operating Expenses attributable to periods prior to the Termination Date at such time as such obligation is determined. If Tenant fails to timely give notice, Tenant will be deemed to have waived its right to terminate under this Paragraph. Tenant's right to terminate the Lease pursuant to this Paragraph is personal to Tenant and may not be assigned. In the event of an assignment of the Lease or sublease of any portion of the Premises, this paragraph is null and void. The Fee shall not be reported as rental

income on Landlord's books and shall not be reported as rental expense on Tenant's books, it being the intention of the parties that the Fee is not for Rent or use of the Premises and that no state of Florida sales tax shall be due on the Fee. If sales tax is required to be paid on the Fee, the Tenant shall pay the said sales tax unless the same was due solely to the Landlord's failure to record the Fee as non-rentable income.

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 6

CONTRACTION RIGHT

Contraction Right. Provided Tenant is not in default, Tenant shall have an option to contract its Premises to not less than _____ rentable square feet (the "Contraction Option") in accordance with the provisions of this paragraph _____. Such Contraction Option shall be exercised by Tenant, if at all, only from and including the _____ (_____) month of the Initial Term through and including the _____ (_____) month of the Initial Term by the giving of written notice to Landlord ("Tenant's Notice") not later than _____ (_____) days prior to the effective date of such contraction (the "Contraction Date"), provided that (i) on or before the Contraction Date, Tenant has paid Landlord all amounts due and owing under the Lease; and (ii) Tenant pays to Landlord a contraction fee ("Contraction Fee") equal to the unamortized portion of (i) Landlord's leasing costs, including the Tenant Improvement Allowance, legal costs and leasing commission charges and (ii) the _____ (_____) months free rent concession provided to Tenant in the amount of $_____, together with interest on all of such sums thereon at the rate of _____ percent (____%) per annum, multiplied by a fraction, the numerator of which is the portion of the Premises to be surrendered to Landlord (the "Contraction Premises") and the denominator of which is the rentable square footage of the Premises prior to contraction. Such amortization shall be calculated over the Initial Term (_____ (_____) months). One-half of such Contraction Fee shall be paid concurrently with Tenant's Notice and the balance of the Contraction Fee shall be paid on or before, and as a condition to, the Contraction Date. Tenant's right to exercise the Contraction Option is conditioned on: (i) Tenant not being in default at the time of exercise of the Contraction Option or on the Contraction Date; and (ii) Tenant not having vacated or subleased the Premises or assigned its interest under the Lease as of the date of exercise of the Contraction Option or on the Contraction Date. If this

Contraction Option is timely exercised, Tenant will deliver possession of the Contraction Premises to Landlord on the Contraction Date in accordance with the terms of the Lease and all other terms and provisions will apply as if the Lease had expired as to the Contraction Premises according to its terms, including Tenant's obligation for the payment of Tenant's Proportionate Share of Operating Expenses attributable to periods prior to the Contraction Date at such time as such obligation is determined. If Tenant fails to timely give notice, Tenant will be deemed to have waived its right to contract under this paragraph. Tenant's right to contract the Premises pursuant to this paragraph is personal to Tenant and may not be assigned. In the event of an assignment of the Lease or sublease of any portion of the Premises, this paragraph is null and void. Notwithstanding anything contained herein to the contrary, Landlord shall have the right to approve the location and configuration of the Contraction Premises, such approval to be solely within Landlord's discretion, in order to ensure that the Contraction Premises are marketable for lease. In addition to the Contraction Fee, Tenant shall pay all costs and expenses associated with demising the Premises within _____ (____) days after written demand therefor by Landlord.

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PRINCIPLES OF COMMERCIAL LEASING

3. PROTECT THE LANDLORD FROM LIENS.

Discussion:

- Section 713.10 which covers the procedures protecting the landlord from construction liens when the tenant performs work changed in the 2010, 2011 and 2012 sessions and became much easier to work with.

- It used to be that you had to record a notice for each individual lease unless all of the leases for the building or shopping center had exactly the same clause prohibiting liens in which case you could record a blanket notice covering the entire project.

- Over the course of those three years, the statute changed so that not all of the leases must have protection and not all of the leases must have exactly the same language. So now there is really no excuse not to file a blanket notice for an entire multi-tenant project. These changes were triggered by Everglades Electric Supply, Inc. v. Paraiso Granite, LLC, 28 So. 3rd 235 (Fla 4th DCA 2010).

- Contractors achieved some protection because they are entitled to demand a copy of the lease to see if the lease affecting their rights has that language.

- It's not just the landlord who profits from this protection. If a lien gets filed and a tenant is in default unless he bonds off or satisfies the lien quickly, that tenant finds himself in a mad scramble to get it done.

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- So, it is in the tenant's interest as well. That tenant, though, must inform his contractor. Might the contractor want some consideration for losing his lien rights? Maybe so and this needs to be covered in the contract negotiations between the tenant and the contractor to avoid surprises for everyone later on.

- Even if the landlord properly records the notice in the public records, a landlord's interest can still be subject to a materialman's lien if a contractor serves a written demand on the landlord for a copy of the foregoing language and the landlord does not properly respond within 30 days pursuant to subsection (3) of 713.10.

Attachments:
Sample Affidavit
Sample Memorandum
Section 713.10, Florida Statutes
Everglades Elec. Supply, Inc. v. Paraiso Granite, LLC, 28 So.3d 235 (2010)

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 1

Affidavit

STATE OF FLORIDA
COUNTY OF _____

BEFORE ME, the undersigned authority, duly authorized and qualified in the State and County aforesaid to administer oaths and take acknowledgments, this day personally appeared [Name of Affiant/Officer of Landlord], who, being by me first duly sworn, deposes and says:

1. The facts and matters contained and recited in this Affidavit are based upon the personal knowledge of Affiant.

2. This Affidavit is made for the express purpose of responding to the Demand for Copy of Lease Provision Prohibiting Liability for Improvements Made By Lessee (Tenant) (the "Demand Letter"), attached hereto as Exhibit "A" and made a part hereof, which response is in compliance with Section 713.10(3), Florida Statutes.

3. Affiant is the [Title of Officer] for [Name of Company], a Florida [corporation/limited liability company] (the "Company").

4. The Company is the lessor of that particular real property located at [Address of Leased Premises], as referenced in the Demand Letter (the "Leased Premises").

5. Attached hereto as Exhibit "B" is a true and correct copy of the provision of the specific lease for the Leased Premises, which prohibits construction and materialmen's liens caused by the tenant of the Leased Premises from attaching to the Company's interest in the Leased Premises.

6. Attached hereto as Exhibit "C" is a true and correct copy of the recorded memorandum of lease, which prohibits construction and materialmen's liens caused by the tenant of the Leased Premises from attaching to the Company's interest in the Leased Premises.

7. The "Effective Date" of this Affidavit is _____, 20__.

[Signatures appear on the following page]

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FURTHER AFFIANT SAYETH NOT.

_____
_____, Affiant

Sworn to and subscribed before me this _____ day of _____, 20__, by _____ who (check one): [ ] is personally known to me, [ ] produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, or [ ] produced other identification, to wit: _____. Affiant did take an oath.

_____
Print Name:_____
Notary Public, State of Florida
Commission No.:_____
My Commission Expires:_____

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EXHIBIT "A"

Copy of Demand Letter

[Attach a copy of the Contractor's Demand Letter]

EXHIBIT "B"

Provision from Specific Lease of Leased Premises

[Attach a Copy of the Specific Provision from the Lease]

[Tenant agrees that it will make full and prompt payment of all sums necessary to pay for the costs of all repairs and permitted alterations, renovations, improvements, changes and other work done by Tenant in or to the Leased Premises and further agrees to indemnify and save harmless Landlord from and against any and all costs and liabilities incurred by Landlord and against any and all construction, materialman's, laborer's and other statutory or common law liens arising out of or from such work, or the cost thereof, which may be asserted, claimed or charged against all or any part of the Leased Premises or the Property or any portion thereof. Notwithstanding anything to the contrary set forth in this Lease, the interest of Landlord in all or any part of the Leased Premises or the Property shall not be subject to any liens of any kind for improvements or work made or done by or at the instance of Tenant, whether or not the same shall be made or done with the permission or by agreement between Tenant and Landlord, and all persons dealing with or contracting with Tenant or any contractor of Tenant are hereby put on notice of these provisions. In the event any notice, claim or lien shall be asserted or recorded against the interest of Landlord in the Leased Premises or the Property, or any portion thereof, on the account of or extending from any improvement or work made or done by or at the instance of Tenant, or any person claiming by, through or under Tenant, or from any improvement or work the cost of which is the responsibility of Tenant, then Tenant agrees to have such notice, claim or lien canceled, discharged, released or transferred to other security in accordance with applicable Florida Statutes within ten (10) days after notice from Landlord to Tenant, and in the event that Tenant fails to do so, Tenant shall be considered in default under this Lease with like effect as if Tenant shall have failed to pay an installment of rent when due and within any applicable grace period provided for the payment thereof.

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Tenant agrees to join Landlord in the execution of a short form lease to be recorded in the Public Records of _____ County, Florida for the purpose of giving constructive notice of the provisions of this paragraph. Prior to the commencement of any construction work on the Leased Premises, Tenant agrees to deliver a copy of the foregoing paragraph to any and all contractors, materialmen, or laborers that may perform work on the Leased Premises.]

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EXHIBIT "C"

Recorded Memorandum of Lease

[Attached a Copy of the Recorded Memorandum containing the Recording Information]

PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 2

This instrument prepared by and
should be returned to:

_____
_____
_____
_____

MEMORANDUM EVIDENCING THAT
LANDLORD'S INTEREST IS NOT SUBJECT TO LIENS

THIS MEMORANDUM is made and executed as of the _____ day of _____, 2016, by LANDLORD, LLC, a Florida limited liability company (hereinafter referred to as "Landlord"), whose post office address is _____.

WITNESSETH:

That Landlord, is the holder of a leasehold interest in the real property described in Exhibit "A", attached hereto and made a part hereof (hereinafter referred to as the "Premises").

All, or a majority of, the leases affecting the Premises entered into by Landlord, as "landlord" or "lessor", and third parties, as "tenants" or "lessees", contain the following provisions prohibiting liens arising in connection with improvements made by, or at the direction of, such tenants or lessees from attaching to Landlord's interest in the Premises and any improvements located thereon:

"Liens. Tenant shall have no authority or power, express or implied, to create or cause any mechanic's or materialmen's lien, charge or

encumbrance of any kind against the Premises, the Center or any portion thereof and the interest of the Landlord shall not be subject to liens for improvements made by the Tenant. Tenant agrees to join Landlord in the execution of a memorandum or short form of lease to be recorded in the public records for the purpose of giving constructive notice of this provision. Tenant shall keep the Center, Premises and this Lease free from any mechanics', materialmen's or similar liens or encumbrances, and any claims therefor, in connection with any of Tenant's work. Tenant shall remove any such claim, lien or encumbrance by bond or otherwise within twenty (20) days after notice by Landlord. If Tenant fails to do so, Landlord may pay the amount or take such other action as Landlord deems necessary to remove such claim, lien or encumbrance, without being responsible for investigating the validity thereof. The amount so paid and costs incurred by Landlord shall be deemed additional Rent under this Lease payable upon demand, without limitation as to other remedies available to Landlord. Any claim to a lien or encumbrance upon the Center or Premises arising in connection with any of Tenant's work shall be null and void, or at Landlord's option shall attach only against Tenant's interest in the Premises and shall in all respects be subordinate to Landlord's title to the Center and Premises."

It is the intent of Landlord in reciting the provision hereinabove to give notice of the provisions of the paragraph excerpted above and, in connection therewith, to comply with the provisions of Section 713.10(2), Florida Statutes. Landlord's interest in the Premises shall not be provisions of Section 713.10(2), Florida Statutes. Landlord's interest in the Premises shall not be subject to liens for improvements made by tenants or lessees or subject to any mechanic's, laborer's or materialman's lien or any other lien or charge on account of or arising from any contract or obligation of tenants or lessees.

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IN WITNESS WHEREOF, Landlord has executed this Memorandum as of the date first written above.

WITNESSES:	"LANDLORD":
_____	LANDLORD, LLC, a Florida limited liability company
Print Name:_____	
_____	By:_____
Print Name:_____	Name:_____
	Title:_____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____day of _____,2016, by_____, as_____ of
LANDLORD, LLC, a Florida limited liability company, on behalf of the limited liability company. Said person (check one) ❑ is personally known to me, ❑ produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, or ❑ produced other identification, to wit: _____.

Print Name: _____
Notary Public, State of Florida
Commission No.:_____
My Commission Expires:_____

O1380667.v1-4/4/16

Select Year: 2014 Go

The 2014 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 713
LIENS, GENERALLY

View Entire Chapter

713.10 Extent of liens.—

(1) Except as provided in s. 713.12, a lien under this part shall extend to, and only to, the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement or is thereafter acquired in the real property. When an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor.

(2)(a) When the lease expressly provides that the interest of the lessor shall not be subject to liens for improvements made by the lessee, the lessee shall notify the contractor making any such improvements of such provision or provisions in the lease, and the knowing or willful failure of the lessee to provide such notice to the contractor shall render the contract between the lessee and the contractor voidable at the option of the contractor.

(b) The interest of the lessor is not subject to liens for improvements made by the lessee when:

1. The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of the county where the premises are located before the recording of a notice of commencement for improvements to the premises and the terms of the lease expressly prohibit such liability; or

2. The terms of the lease expressly prohibit such liability, and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises, and the notice includes the following:

a. The name of the lessor.

b. The legal description of the parcel of land to which the notice applies.

c. The specific language contained in the various leases prohibiting such liability.

d. A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.

3. The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.

A notice that is consistent with subparagraph 2. effectively prohibits liens for improvements made by a lessee even if other leases for premises on the parcel do not expressly prohibit liens or if provisions of each lease restricting the application of liens are not identical.

(3) Any contractor or lienor under contract to furnish labor, services, or materials for improvements being made by a lessee may serve written demand on the lessor for a copy of the provision in the lease prohibiting liability for improvements made by the lessee, which copy shall be verified under s. 92.525. The demand must identify the lessee and the premises being improved and must be in a document that

is separate from the notice to the owner as provided in s. 713.06(2). The interest of any lessor who does not serve a verified copy of the lease provision within 30 days after demand, or who serves a false or fraudulent copy, is subject to a lien under this part by the contractor or lienor who made the demand if the contractor or lienor has otherwise complied with this part and did not have actual notice that the interest of the lessor was not subject to a lien for improvements made by the lessee. The written demand must include a warning in conspicuous type in substantially the following form:

WARNING

YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.

History.—s. 1, ch. 63-135; s. 35, ch. 67-254; s. 1, ch. 85-103; s. 1, ch. 92-148; s. 806, ch. 97-102; s. 1, ch. 2011-212; s. 4, ch. 2012-211.

Note.—Former s. 84.101.

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28 So.3d 235
District Court of Appeal of Florida,
Fourth District.

EVERGLADES ELECTRIC SUPPLY, INC., a Florida corporation, Appellant,
v.
PARAISO GRANITE, LLC, a Delaware limited liability company, Appellee.

No. 4D09-16.
|
March 3, 2010.

Synopsis

Background: Landlord's assignee brought action against sub-subcontractor on a construction project initiated by a tenant seeking, among other things, to discharge a construction lien filed by the sub-subcontractor, and sub-subcontractor counterclaimed to enforce the lien. The Seventeenth Judicial Circuit Court, Broward County, John B. Bowman, J., awarded summary judgment to landlord's assignee. Sub-subcontractor appealed.

Holding: The District Court of Appeal, Stevenson, J., held that landlord's statutory notice that all leases contained language prohibiting construction liens against the landlord's property was defective.

Reversed and remanded.

West Headnotes (1)

[1] Mechanics' Liens
Notice or protest by owner to prevent lien

Landlord's statutory notice filed with county clerk stating that all leases at particular property contained language prohibiting construction liens against the landlord's property for work performed on behalf of a tenant was defective, and thus sub-subcontractor on tenant's construction project could assert lien against property owned by landlord's assignee; language in notice was not identical to the language in every lease prohibiting such liens, but rather at least one lease contained language that was significantly different, and more conditional, than the language in the notice. West's F.S.A. § 713.10(2).

Cases that cite this headnote

Attorneys and Law Firms

*235 George H. Aslanian, Jr., of Aslanian & Aslanian, Fort Lauderdale, for appellant.

Stuart H. Sobel and Daniel J. Barsky of Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., Coral Gables, for appellee.

Opinion

STEVENSON, J.

This is an appeal from a final summary judgment discharging a construction lien filed by appellant, Everglades Electric Supply, Inc., against a shopping center owned by appellee, Paraiso Granite, LLC. Everglades was a sub-contractor for improvements that one of Paraiso's tenants made on the storefront it leased from Paraiso. We reverse the summary judgment because the section 713.10 notice filed by Paraiso Granite, which could have precluded the lien on the shopping center for *236 improvements to the leased storefront, was defective. [1]

GKK-Pembroke, Ltd., owned Paraiso Parc, a Publix-anchored shopping center in Broward County with units GKK-Pembroke leased to other businesses. In May 2005, GKK-Pembroke entered into a lease for one of the units that contained the following provision:

> 10.01 *Liens.* Nothing contained in this Lease shall be construed to confer upon any party, including, without limitation, material men and contractors, the right to file a mechanic's or material men's lien or other lien or any claim relating thereto, nor to perform any labor or to furnish any materials for the account of Landlord in respect to the construction of any improvements, alterations or

> repairs to the Premises by Tenant, its employees, agents, or contractors.

The following month, and pursuant to Florida's Construction Lien Law, *see* §§ 713.001-.37, Fla. Stat. (2007), GKK-Pembroke filed a notice with the Broward County clerk containing the following statement:

3. All leases entered into by GKK-PEMBROKE with Lessees for premises on the Exhibit "A" property contain the following language:

> "***Lien for Tenant Improvements:*** This Lease expressly provides, pursuant to Section 713.10 Florida Statutes, that the interest of the Landlord shall not be subject to liens for improvements made by Tenant. The Tenant shall notify the contractor making any such improvements of such provision in the Lease, and the knowing or willful failure of Tenant to provide such notice to the contractor shall render the contract between the Tenant and the contractor voidable at the option of the contractor."

4. Therefore, potential lienors are put on notice that no lien may be filed against the Exhibit "A" property for work done on behalf of Lessees on any portion of the Exhibit "A" property.

Appended to this notice was a legal description of the subject property, the shopping center.

Later in 2006, GKK-Pembroke and Boca Tanning Systems, Inc., signed a ten-year lease for a storefront in the shopping center. In building out the storefront for its business, Boca Tanning appears to have engaged Living Water Construction & Development, Inc., as its general contractor. At some point, Living Water contracted with subcontractor Strickland Electric, which in turn contracted with sub-subcontractor Everglades Electric, the appellant here. GKK-Pembroke sold Paraiso Parc to Paraiso Granite, LLC, the appellee, in March 2007. Accordingly, GKK-Pembroke assigned to Paraiso Granite its interest in the shopping center, including all of the leases.

In July 2007, when Everglades Electric had not been paid for some of its work, the company recorded a claim of lien against the property leased by Boca Tanning, which property was now owned by Paraiso Granite. Paraiso Granite's property manager discovered the lien sometime in 2008 and unsuccessfully attempted to have Everglades Electric release it. Paraiso Granite subsequently filed this lawsuit to discharge the lien, among other things. In its answer to Paraiso Granite's complaint, Everglades Electric raised a counterclaim to enforce its lien against ***237** Paraiso Granite. Paraiso Granite moved for summary judgment, arguing that the notice it had filed under section 713.10 prevented Everglades Electric from recording its lien against the shopping center. Everglades Electric responded by essentially arguing that Paraiso Granite's section 713.10 notice was defective since not all leases in effect contained the language from the notice. After a hearing, the trial judge granted Paraiso Granite's motion and discharged Everglades Electric's lien.

We review an entry of summary judgment *de novo*. *Craven v. TRG-Boynton Beach, Ltd.*, 925 So.2d 476, 479 (Fla. 4th DCA 2006). A party moving for summary judgment must show conclusively the absence of any genuine issue of material fact. *Id.* at 479-80. In considering the motion, the court must make every possible inference in favor of the moving party. *Id.* at 480. "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Id.* We conclude that the trial judge erred because Paraiso Granite did not conclusively show that the facts entitled it to summary judgment.

GKK-Pembroke's notice did not fully comply with Florida's Construction Lien Law such as to categorically bar Everglades Electric's lien. Section 713.10, Florida Statutes (2007), concerns the extent of a construction lien filed under the law. It provides that a lien "shall extend to, and only to, the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement." *Id.* If, however, "an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor." *Id.*

But, the statute provides three ways for a lessor to prevent a lien from attaching to his or her interest in the property; only the first two are relevant here. First, the lessor can record "[t]he [subject] lease or a short form thereof ... in the clerk's office and the terms of the lease expressly prohibit such liability." § 713.10(1). Second,

> [when] *[a]ll of the leases* entered into by a lessor for the rental of premises on a parcel of land prohibit such liability

and a notice which sets forth the following is recorded by the lessor in the public records of the county in which the parcel of land is located:

(a) The name of the lessor.

(b) The legal description of the parcel of land to which the notice applies.

(c) The specific language contained in the various leases prohibiting such liability.

(d) A statement that all leases entered into for premises on the parcel of land contain the language identified in paragraph (c).

§ 713.10(2) (emphasis added). When a lessor properly follows one of these procedures, "[t]he interest of the lessor shall not be subject to liens for improvements made by the lessee." § 713.10.

Everglades Electric contends that Paraiso Granite could not use subsection 713.10(2) because not every lease it had signed contained the same language prohibiting liens. Paraiso Granite argues in response that all of its leases contained a lien prohibition, even though they were worded slightly differently from each other or from the section 713.10 notice. We agree with Everglades Electric. A lessor can avail itself of the blanket notice provided for in subsection 713.10(2) only if, as the plain language of the statute states, "[a]ll of the leases entered into by a lessor ... prohibit such liability" and the lessor files a notice containing "[t]he specific language contained in the various leases prohibiting ***238** such liability." Here, the ostensibly lien-prohibiting language in the May 2005 lease was significantly different, and more conditional, than the language in the section 713.10 notice. Thus, not all of the leases contained the notice language. Therefore, GKK-Pembroke did not comply with section 713.10 and its notice was defective.

Paraiso Granite urges us to interpret subsection 713.10(2) to operate prospectively, so that only leases entered into after the filing of a notice need conform to the language in the notice and only those leases would be protected. Under this interpretation, any leases entered into prior to the filing of a notice would be irrelevant. Paraiso Granite's interpretation of subsection 713.10(2) is erroneous, since the plain language of the statute clearly encompasses all leases and does not distinguish between those leases entered into before the notice was filed and those entered into after. Paraiso Granite argues that the interpretation we adopt would leave lessors with little protection against claims by laborers and materialmen. We disagree. In this instance, Paraiso Granite could have followed the procedure in subsection 713.10(1) by recording short-form leases until any non-conforming leases were no longer in effect. Once they were no longer in effect, it could have recorded the blanket notice.

Because the section 713.10 notice was defective, we hold that the trial judge erred in granting Paraiso Granite's motion for summary judgment and in discharging Everglades Electric's lien. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and Remanded.

WARNER and LEVINE, JJ., concur.

All Citations

28 So.3d 235, 35 Fla. L. Weekly D501

Footnotes

1 Everglades Electric raises four other issues in this appeal, but we decline to address them because we reverse on this point.

End of Document

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PRINCIPLES OF COMMERCIAL LEASING

4. INSIST ON CREDIT ENHANCEMENT

Discussion

- Credit enhancement includes the following items:
  - Guarantees.
  - Cash security deposits.
  - Letters of credit.
- If your tenant is a publicly traded company, you are not going to get any of these. If you tenant is not publicly traded, you should try to get one or more of these.
- Don't be afraid to ask for these. If the tenant balks, you may already have a problem.
- If you have a problem down the road, you are going to be elated that you got one of these credit enhancements because it will completely change the workout of that problem.
- Which of these you get and how much of a deposit or a letter of credit has to be tailored to the nature of the tenant and to the deal but insist on some credit enhancement.
- Get the financial statement of your tenant and your guarantors upfront and annually. Even if your tenant is publicly traded, you should be checking their credit annually and it's easier to do that with a publicly traded tenant because that information is generally available online or on the ratings agencies' websites.

- Case: In re Northeastern National Airways, Inc. (U.S. Bk. Ct. S.D. Fla. 1989)
    - This case stands for the proposition that a landlord holding a security deposit is considered to be a "secured party" in bankruptcy with the rights of a secured creditor, and has a right to the security deposit as a setoff against the damages a landlord is owed.

Attachments:
Sample – Security Deposit
Sample – Guaranty of Lease
Sample – Letter of Credit
In re Northeastern International Airways, Inc. (U.S. Bk. Ct. S.D. Fla. 1989)
Commercial Leases in Bankruptcy, 18-FEB Bus. L. Today 55

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 1

Security Deposit. Contemporaneously with the execution of this Lease, Tenant has deposited with Landlord the sum of _____DOLLARS ($_____) (hereinafter referred to as the "Security Deposit"), the receipt of which is hereby acknowledged by Landlord as security for the full and faithful performance by Tenant of all of the terms, covenants and conditions of this Lease upon Tenant's part to be performed, which Security Deposit shall be returned to Tenant within thirty (30) days after the expiration of the Term of this Lease, provided Tenant has fully and faithfully performed Tenant's obligations hereunder. Landlord shall have the right, but not the obligation, to apply any part of the Security Deposit to cure any Event of Default of Tenant, and if Landlord does so, Tenant shall, upon demand, deposit with Landlord the amount so applied so that Landlord shall have the full Security Deposit on deposit at all times during the Term of this Lease. No interest shall be paid by Landlord to Tenant on the Security Deposit.

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PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 2

GUARANTY OF LEASE

In consideration of the agreement of _____, a _____ _____ (the "Landlord") to enter into that certain Lease Agreement executed of even date herewith with _____, a _____ _____ (hereinafter referred to as the "Tenant"), _____, a _____ (hereinafter referred to as "Guarantor"), hereby guarantees to Landlord the full and timely payment of all installments of rent and other sums due to Landlord, his its successors and assigns, under the Lease Agreement and the full and timely performance of all the terms, conditions, provisions and covenants to be performed by Tenant under the Lease Agreement. This Guaranty of Lease is absolute and unconditional. Guarantor agrees that Landlord shall not be first required to seek or obtain a judgment against Tenant, or institute any proceeding or take any other action with respect to Tenant, before Landlord can enforce its rights under this Guaranty of Lease.

Upon any default by Tenant under the Lease Agreement, Guarantor agrees to pay any amount due to Landlord from Tenant for rent or other sums due throughout the term of the Lease Agreement and any renewals thereof, and to reimburse Landlord for any and all loss, cost, expense and damage (including consequential and incidental damages) incurred by Landlord arising out of or resulting from a breach of any terms, conditions, provision or covenant of the Lease Agreement by Tenant during the term thereof.

Guarantor waives all rights to notice in connection with this Guaranty of Lease, including, but not limited to, notice of acceptance of this Guaranty of Lease by Landlord. Guarantor agrees that, with or without notice to Guarantor, Landlord may at any time, either with or without consideration:

(a) Agree to any amendment, modification or assignment of the Lease Agreement;

(b) Agree to any renewal or extension of the Lease Agreement;

(c) Release any party directly or indirectly liable for the payment or performance of any of the terms, conditions, provisions and covenants of the Lease Agreement; and

(d) Waive enforcement of the terms, conditions, provisions and covenants of the Lease Agreement with respect to any breach or default thereunder.

At the option of Landlord, this Guaranty of Lease may be treated as a guaranty or a suretyship. In either event, Landlord shall have the right to proceed hereunder against the Guarantor without first proceeding against Tenant or any other person liable under the Lease Agreement or this Guaranty of Lease.

This Guaranty of Lease shall bind and inure to the benefit of the respective heirs, personal representatives, successors and assigns of Landlord and Guarantor. In the event it becomes necessary for Landlord to enforce this Guaranty of Lease by legal action, Guarantor hereby agrees that jurisdiction and venue of such action shall be in Orange County, Florida and that Landlord shall be entitled to recover any and all costs and expenses Landlord may incur in connection with such action, including reasonable attorneys' fees at or before the trial level and in any appellate proceeding.

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IN WITNESS WHEREOF, Guarantor has executed this Guaranty of Lease and has intended the same to be and become effective as of the ____ day of _____, 2016.

Signed, sealed and delivered
in the presence of:

GUARANTOR

_____

Print Name:_____

_____, a _____

_____

Print Name:_____

By:_____

Name:_____

Title:_____

Tax I.D. No.:_____

O1380667.v1-4/4/16

PRINCIPLES OF COMMERCIAL LEASING

Sample Provision No. 3

Letter of Credit. Tenant shall provide Landlord with a Letter of Credit in the amount of $_____to secure Tenant's obligations under the Lease. The Letter of Credit shall be renewed each year during the Lease Term and shall extend until thirty (30) days after the Lease Term Expiration Date. The Letter of Credit shall provide that the issuing Bank will renew the Letter of Credit unless the bank gives Landlord at least sixty (60) days prior written notice of its intent to not renew the Letter of Credit. In the event of such notice, Landlord shall be entitled to draw upon the Letter of Credit unless Tenant immediately substitutes another letter of credit, or other security reasonably satisfactory to Landlord, as provided below. The Letter of Credit shall be issued by a federally insured bank in form and substance reasonably satisfactory to Landlord. The Letter of Credit shall be governed by the International Standby Practices set by the International Chamber of Commerce, and shall be transferable by Landlord (with multiple transfers permitted).

If, at any time after applicable cure periods, Tenant fails to perform any of its obligations under this Lease, including its rent or other payment obligations, then Landlord may, at its option, draw upon the Letter of Credit to cure Tenant's default or to pay for damages caused by Tenant's default. If the Lease has been terminated, then Landlord may draw upon the letter of credit to recover the damages incurred as a consequence of Tenant's breach. Landlord's exercise of its rights to draw under the Letter of Credit shall not limit Landlord's remedies for default under the terms of this Lease. If Landlord draws upon the Letter of Credit, in whole or in part, prior to the Expiration Date or any termination of this Lease, then Tenant shall restore immediately the Letter of Credit to the original amount.

Landlord shall be entitled to draw upon the Letter of Credit upon Landlord's written statement to the Tenant and Issuer that Tenant is in default under the terms of the Lease and any applicable cure period has expired.

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Provided there is no lapse of coverage, Tenant may substitute a Letter of Credit issued by a different federally insured bank for the original Letter of Credit. With the consent of Landlord, Tenant may substitute cash or a cash equivalent reasonably satisfactory to Landlord for the Letter of Credit.

Notwithstanding the foregoing, provided that Tenant has not committed an Event of Default and is not then in default, as of the first anniversary of the Commencement Date hereunder, Tenant may replace the Letter of Credit with a cash security deposit in the amount of $_____, such security deposit to be held and disbursed in accordance with the provisions of this paragraph 6 applicable to the Letter of Credit and proceeds thereof. In addition, in the event that Tenant exercises its first Option and complies with the conditions applicable to same, then, at the commencement of the first Option Term, the security deposit shall be reduced to the amount of monthly Rent to be paid for the first year of the first Option Term.

O1380667.v1-4/4/16

99 B.R. 487
United States Bankruptcy Court,
S.D. Florida.

In re NORTHEASTERN INTERNATIONAL AIRWAYS, INC., Debtor.

Bankruptcy No. 85–00017–BKC–SMW.
|
May 15, 1989.

Creditor moved to amend judgment which found its claim to be unsecured. The Bankruptcy Court, Sidney M. Weaver, J., held that creditor holding debtor's security deposit as collateral to insure future payment was entitled to setoff, and thus was secured creditor to extent of security deposit, regardless of fact that parties did not execute written security agreement or that creditor did not exercise its setoff rights prepetition.

Relief granted.

See also, D.C., 56 B.R. 247.

West Headnotes (2)

[1] **Bankruptcy**
Security Deposits

Creditor holding debtor's security deposit as collateral to insure future payment was entitled to setoff, and thus was secured creditor to extent of security deposit, regardless of fact that parties did not execute written security agreement or that creditor did not exercise its setoff rights prepetition. Bankr.Code, 11 U.S.C.A. §§ 506, 553.

6 Cases that cite this headnote

[2] **Bankruptcy**
Amendment or Withdrawal

Creditor was entitled to amend its proof of claim so as to assert right of setoff in security deposit given by debtor absent showing of prejudice; original proof of claim contained sufficient information to advise interested parties of creditor's secured status with respect to deposit. Bankr.Code, 11 U.S.C.A. §§ 506, 553.

7 Cases that cite this headnote

Attorneys and Law Firms

*487 Mary M. Aubry, Miami, Fla., Arnold D. Kolikoff, Joseph Lesser, New York City, for creditor.

Jeffrey B. Lathe, West Palm Beach, Fla., for trustee.

MEMORANDUM ORDER GRANTING CREDITOR'S MOTION TO AMEND JUDGMENT AND AMEND PROOF OF CLAIM

SIDNEY M. WEAVER, Bankruptcy Judge.

THIS MATTER came before the Court for hearing on March 29, 1989 upon The Port Authority of New York and New Jersey's (the "creditor") Motion To Alter or Amend Judgment and Motion To Amend Proof of Claim filed March 25, 1985. The Court on February 16, 1989 signed an order allowing the creditor's claim as a general unsecured claim for $268,458.79 based on the trustee's representation that a written security agreement signed by the debtor was needed in order for the creditor to claim $215,000.00 as secured. On rehearing the creditor has challenged the trustee's argument that a written security agreement is necessary in order for the creditor to have a right of setoff and allow a portion of the claim declared secured. The Court having revisited the issues presented, considered arguments of counsel, and being otherwise fully advised in the premises, does hereby make the Following Findings of Fact and Conclusions of Law:

In January, 1984, the debtor requested permission to conduct flight operations at John F. Kennedy International Airport ("JFK"). In order to obtain permission the creditor required the debtor to post a $200,000.00 *488 security deposit to cover anticipated airport user fees. The security deposit was placed in a separate bank account at Citibank, New York, New York, titled "Port Auth s/a Northeastern Airways." Between February and December 1984 the debtor incurred a debt for $267,253.91 from flight operations at JFK. In January, 1985, the debtor filed a chapter 11 petition. Consequently, on March 4, 1985, the creditor filed a proof of claim asserting a pre-petition claim for unpaid airport usage

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fees in the amount of $268,458.79. The creditor's proof of claim indicated that $215,000.00 of the claim was secured based on the creditor's possession of a security deposit and $53,458.79 as unsecured. The proof of claim was silent as to the creditor's setoff right.

First, the creditor argues that it is a secured creditor under 11 U.S.C. § 506 to the extent of the security deposit it holds as collateral for airport fees owed to the debtor. Under 11 U.S.C. § 506 a claim is secured to the extent that the claim is subject to a right of setoff under 11 U.S.C. § 553. Accordingly, under 11 U.S.C. § 553, the filing of a bankruptcy case does not affect any right of a creditor to offset a mutual debt owing to the debtor which arose prior to the commencement of the bankruptcy case. The right to setoff is within the discretion of the court, however, it is generally favored and will not be set aside unless there is an abuse of discretion. *Melamed v. Lake County National Bank,* 727 F.2d 1399, 1404 (6th Cir.1984). *See also In the Matter of Bohack Corporation,* 599 F.2d 1160 (2nd Cir.1979); *In re R.C.I. Enterprises, Inc.,* 22 B.R. 549, 551 (Bankr.S.D.Fla.1982).

In order for the right of setoff to exists there has to be mutual debts. *See In re Utica Floor Maintenance Inc.,* 41 B.R. 941 (Dist.N.D.N.Y.1984); *In the Matter of Springfield Casket Co. Inc.,* 21 B.R. 223 (Bankr.S.D.Ohio 1982); *In re Chestnut Co.,* 39 B.R. 519, 521 (Bankr.D.S.C.1984). The criteria of "mutuality" requires mutual debts owed by the creditor to the debtor and by the debtor to the creditor, which arose before the commencement of the case, and none of the statutory exceptions to setoff apply. *In re Utica Floor Maintenance Inc.,* 41 B.R. at 944. Also, a right of setoff exist when a creditor possesses a security deposit as collateral to insure future payment. *See, e.g., Brooks Shoe Manufacturing Company v. United Telephone Co.,* 39 B.R. 980 (Dist.E.D.Pa.1984); *In the Matter of Lackow Brothers, Inc.,* 22 B.R. 1022 (Bankr.S.D.Fla.1982); *In re Inslaw, Inc.,* 81 B.R. 169, 170 (Bankr.D.D.C.1987).

[1] The facts show that the debtor failed to pay its airport fees between February and December 1984 thereby creating a debt owed by the debtor to the creditor in the amount of $267,253.91. Assuming that this debt had not been incurred the creditor would owe the debtor the entire amount of the security deposit. However, the debtor's failure in paying its airport fees created mutual debts owed by the debtor to the creditor (unpaid airport fees) and by the creditor to the debtor (the security deposit) which arose before commencement of the case. Accordingly, the Court finds mutual debts existed between the parties prior to the commencement of the case which entitles the creditor to a right of setoff under 11 U.S.C. § 553.

The trustee argues that the creditor is not entitled to a secured status under 11 U.S.C. § 506 or setoff under § 553 because the parties did not execute a written security agreement or perfect its interest. However, the Court finds that the right of setoff does not depend on the existence of a written security agreement or the parties having contractually agreed to the right. *See In re McLean Industries, Inc.,* 90 B.R. 614, 618 (Bankr.S.D.N.Y.1988). Instead a right of setoff exist under 11 U.S.C. § 553 if the parties owe each other mutual debts. *See In re Utica Floor Maintenance Inc.,* 41 B.R. 941 (Dist.N.D.N.Y.1984); *In re Chestnut,* 39 B.R. 519, 521 (Bankr.D.S.C.1984); *In the Matter of Springfield Casket Co. Inc.,* 21 B.R. 223 (Bankr.S.D.Ohio 1982). Furthermore, under New York U.C.C. § 9–203(1)(a) and Fla.Stat. § 679.203(1)(a), a written security agreement is not necessary in order to create an enforceable security interest if the collateral ***489** is in the possession of the secured party. *See In the Matter of O.P.M. Leasing Services, Inc.,* 46 B.R. 661, 670 (Bankr.S.D.N.Y.1985). Moreover, under New York U.C.C. § 9–304(1) and Fla.Stat. § 679.304(1) a security interest in money can be perfected by the secured party taking possession. *Id.* at 670. Therefore, the Court finds that the creditor's possession of the security deposit perfects the security interest and entitles the creditor to a right of setoff under 11 U.S.C. § 553. Accordingly, a claim subject to setoff under § 553 is a secured claim under § 506.

The trustee further argues that the creditor has lost its right to claim a secured status or setoff because it failed to act before or during the pendency of the bankruptcy case. The Court finds that the creditor's right to setoff is not lost by its failure to act pre-petition. Instead, a right to setoff post-petition merely requires that the creditor obtain permission of the court. *In re Crabtree,* 76 B.R. 208, 210 (Bankr.M.D.Fla.1987). The mere passage of time, without more, will not waive a creditor's right to setoff. *In re Handy,* 41 B.R. 172, 175 (Bankr.E.D.Va.1984). Neither the Code or the Rules of Bankruptcy Procedure specify a timetable by which setoff must be accomplished. *Id.* at 174.

[2] Secondly, the creditor seeks to amend its proof of claim in order to correct a computational error, reflect additional accrued interest on the security deposit, describe the claim with more particularity, and to specifically assert the right of setoff. The trustee objects to the amendment of the proof of

claim alleging that a right of setoff is waived if not asserted in the proof of claim. The trustee relies on the case of *In re Butler,* 61 B.R. 790, 791 (Bankr.S.D.Fla.1986) which states that a creditor will be deemed to have waived his right of setoff if he files a proof of claim without asserting the right. *Id.* at 791, *citing, Collier on Bankruptcy,* 553.07 n. 1 (15th ed. 1985). Additionally, the trustee argues that to allow amendment of the proof of claim will result in prejudice to the estate and invite further litigation.

After reviewing the original proof of claim the Court finds that it contained sufficient information to advise the trustee and interested parties of the creditor's secured status with respect to the $215,000.00 deposit. The Court further finds that creditor is entitled to amend its proof of claim to plead a right of setoff as no prejudice will result from the proposed amendment. A proof of claim may be freely amended where the purpose of the amendment is to cure a defect in the original claim, to describe the claim with greater particularity, or to plead a new theory of recovery upon facts set forth in the original claim. *In re International Horizons, Inc.,* 751 F.2d 1213, 1216 (11th Cir.1985); *See also In re South Atlantic Financial Corp.,* 767 F.2d 814, 819 (11th Cir.1985). Although, this Court agrees with the general rule cited in *In re Butler,* 61 B.R. at 791, there are exceptions to this rule which allow amending proof of claims where there is no detrimental reliance by a party in interest. *See In re Diplomat Electric, Inc.,* 499 F.2d 342, 347 (5th Cir.1974); *In re Sound Emporium, Inc.,* 48 B.R. 1 (Bankr.W.D.Tex.1984), *aff'd,* 70 B.R. 22 (W.D.Tex.1987); *In re Denby Stores, Inc.,* 86 B.R. 768, 777 (Bankr.S.D.N.Y.1988). Furthermore, the possibility of further proceedings resulting from an amendment of a claim does not constitute the kind of prejudice warranting denial of the right to amend. *In re Commonwealth Corp.,* 617 F.2d 415, 423 (5th Cir.1980). Moreover, motions for leave to amend are liberally permitted because bankruptcy court is a court of equity. *Id.* at 419–421.

The trustee has not presented any evidence to show that there has been detrimental reliance by an interested party or that prejudice will result to any creditor by the proposed amendment. The proposed amendment only seeks to adjust the total claim amount to $267,253.91 in order to correct a computational error and reflect accrued interest of $36,448.65. In addition, the proposed amendment will specify with greater particularity the circumstances under which the obligation arose, while containing the same basic factual allegations as the original claim and specifically plead ***490** a setoff right. Therefore, the Court finds that the creditor is entitled to amend its proof of claim in order to adjust the total claim amount and assert a setoff right.

Based upon the foregoing, it is hereby:

ORDERED AND ADJUDGED that the Motion To Alter or Amend Judgment and Motion To Amend The Port Authority's Proof of Claim are granted. The Order entered February 24, 1989 is amended to reflect the Court's finding that a portion of the creditor's claim, in the amount of $236,448.65, shall be allowed as secured under 11 U.S.C. § 506 which is that portion of the creditor's claim subject to setoff under 11 U.S.C. § 553 and $30,805.26 shall be allowed as unsecured. Furthermore, the Proof of Claim filed by the creditor on March 25, 1985 for $268,458.79 shall be amended to adjust the total claim amount and plead a setoff right.

DONE AND ORDERED.

All Citations

99 B.R. 487

End of Document

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Feature

COMMERCIAL LEASES IN BANKRUPTCY
What Happens to the Security Deposit?

Paul E. Escobar[a1]

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In the present financial crisis fueled by a tightening credit market, commercial landlords are facing an increase in the number of tenants filing for bankruptcy protection under Chapters 7 and 11 of the U.S. Bankruptcy Code (*see* 11 U.S.C. §§ 701 and 1101, et seq.). Oftentimes a distressed tenant--such as a newly formed corporation funded by venture capital or a retailer that expanded too quickly--has deposited a large security deposit with its landlord to secure the lease, which, at the time of the bankruptcy filing, might have several years remaining under the natural lease term. Questions that arise are whether the security deposit belongs to the landlord or the tenant and what are their respective rights to the deposit before, during, and after the bankruptcy proceedings.

This article is intended to provide attorneys who represent commercial landlords with a basic guide on how to handle security deposits after one of their client's tenants has filed for Chapter 11 of the Bankruptcy Code, under which a debtor seeks to continue as a business by reorganizing and restructuring its debt, as opposed to Chapter 7 of the Code, under which a debtor typically liquidates its assets and effectively goes out of business. All such attorneys should have a basic understanding of a landlord's rights in a bankruptcy action. A brief summary of the basics follows.

Automatic Stay

Under section 362(a) of the Code, once a tenant files for bankruptcy protection, the filing generally acts as an automatic stay on any action for past rent or eviction or termination of the lease, with limited exceptions. Pursuant to sections 362(b)(10) and 541(b) (2), however, the stay does not apply to actions to recover possession of the leased premises if the lease is terminated prior to the date the bankruptcy petition was filed, on the basis the lease would not be considered an asset of the debtor's estate at the time the bankruptcy petition is filed. The date of filing is generally referred to as the "petition date."

Lease Rejection Damages

Pursuant to section 365(d)(4), a debtor has 120 days from the petition date within which to assume or reject the lease. A debtor may seek a 90-day extension from the court prior to the expiration of that time period. Any further extensions require the prior written consent of the landlord. If a debtor chooses to reject the lease, the landlord will be entitled to lease rejection damages consisting of what the tenant owes in rent from the date of filing (the petition date) through the natural lease termination date. Section 502(b)(6) imposes a cap on those damages equal to the greater of one year of rent or 15 percent of the rent, not to exceed three years, for the remaining term. For leases with several years remaining under the term, a landlord in most cases will only be entitled to one year's worth of future rent, including, arguably, any cost-of-living increases and common area maintenance charges that typically would be charged to the tenant for that year. The court will treat or allow the lease rejection damages as a general unsecured claim, which essentially means the landlord will stand in line with other general unsecured creditors

in hopes of getting paid sometime in the future after a reorganization plan is approved by the court and/or distributions from the estate are made to creditors.

Pre-petition Damages

In addition to lease rejection damages to which a landlord is entitled upon rejection of the lease, the landlord is also entitled under section 502(b)(6) (B) to any pre-petition damages consisting of rent due and unpaid as of the petition date, as well as legal fees if provided for in the lease. Notably, there is no cap on pre-petition damages under section 502(b)(6). Thus, in preparing a proof of claim form to be submitted to the court, the landlord would be entitled to both lease rejection damages and pre-petition damages as an unsecured claim. As a practical matter, it might be easier to attach an explanation of the calculations as an exhibit to the form, especially if there are any unusual issues such as multiple leases with the debtor. Attaching a separate exhibit also makes it much easier to distinguish and track the various categories of damages and/or claims to which a landlord is entitled under the Code.

***56 Post-petition Rent**

A company that has its primary business operations at the leased premises would likely want to remain there after filing for Chapter 11 protection. If the debtor remains at the leased premises after the petition date (or post-petition), a landlord would be entitled to rent during the bankruptcy under section 365(d)(3), until the tenant rejects the lease, surrenders and vacates the premises, or assumes the lease. The rent would be considered an administrative expense or priority claim pursuant to section 503(b)(1)(A). In most cases, the debtor will continue to pay administrative rent while it decides to reject or assume the lease, obviating a landlord having to file a motion for administrative rent. If the debtor accepts or assumes the lease, it should continue paying administrative rent during its reorganization. As with pre-petition damages, sections 503(b)(1)(A) and 502(b)(6) do not cap administrative rent, which, as a practical matter, means the debtor would be subject to any cost-of-living adjustments and other rent charges provided for in the lease.

If a tenant decides to remain in possession of the premises post-petition and assume the lease, it must cure any lease default and pay all rent due, including rent due at the time of filing, and provide adequate assurance of future ability to perform under the terms of the lease, pursuant to section 365(b)(1). In some instances, a tenant might not pay rent while it continues to occupy the premises, forcing the landlord to file a motion for administrative rent or, if the tenant cannot pay, a motion for relief from the automatic stay to terminate the lease and initiate summary eviction procedures. In that case, it is always advisable to contact the debtor's bankruptcy counsel to determine how best to resolve the issue of rent or determine whether filing such a motion is necessary. If either the size of the debtor's company and/or number of creditors is large, a landlord might find it very difficult to establish effective communication with the debtor or determine precisely what the debtor's intentions are. A tenant with multiple leases with other landlords (as in a retail chain) might wait to decide whether to accept or reject the lease, based upon its determination as to whether business at the premises will be profitable post-petition. In other words, a debtor might not know what its corporate objectives are with respect to the lease until the deadline for lease rejection is imminent. If the matter of rent between the petition date and lease rejection is not resolved, the landlord would be entitled under sections 502(b)(6) and 503(b)(1)(A) to assert claims for lease rejection damages, pre-petition damages, and post-petition administrative rent for damages prior and up to the date of lease rejection.

Offsetting Landlord's Claim

Pursuant to section 553(a), a landlord may use the security deposit to offset the total amount of lease rejection damages and pre-petition damages, on the basis the landlord is entitled to setoff as a secured creditor to the extent of the security deposit. Therefore, if a tenant vacates the premises before or after the date it files for bankruptcy protection and later rejects the lease, a landlord would be entitled to the total amount of lease rejection damages and pre-petition damages, if any, offset by the amount of the security deposit. Under section 362(a)(7), however, relief from the automatic stay is needed to set off a security deposit

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post-petition. As a practical matter, the landlord should list the amount of the security deposit on the proof of claim form as a credit or deduction from the total amount claimed.

To summarize, the claims allowed under the Code generally consist of lease rejection damages subject to a cap, pre-petition rent, and in some instances post-petition or administrative rent. Attorneys also should know how to prepare and file proofs of claims that distinguish among the various types of claims, including using the security deposit to offset the claims.

Whose Asset Is It?

In general, a security deposit is an asset of the bankruptcy estate under section 541(a). A landlord, however, has a security interest in the deposit, and courts have permitted landlords to retain security deposits to the extent of their allowable claims. In *Oldden v. Tonto Realty Corp.*, 143 F.2d 916 (2d Cir. 1944), the court held that a landlord may deduct the security deposit from the landlord's allowed claim, but that any surplus must be returned to the debtor. Further, in *ITXS, Inc. v. F&S Hayward, LLC*, No. 03-3082-MBM, slip op. at 8 (W.D. Pa. Dec. 13, 2004), the court ruled that a landlord's security deposit constitutes, as a matter of law, a perfected security interest or lien in the landlord's favor. Likewise, in *In re Johnson*, 215 B.R. 381, 384 (Bankr. N.D. Ill. 1997), the court held that a landlord's interest in a security deposit was akin to a nonjudicial lien. And in *In re Northeastern International Airways, Inc.*, 99 B.R. 487, 488-89 (Bankr. S.D. Fla. 1989), the court found that a creditor's possession of the security deposit perfected the security interest in the deposit.

Although most landlords hold cash security deposits, some landlords require letters of credit to secure a tenant's lease obligations. A letter of credit does not automatically constitute an asset of the debtor's estate. In *In re Elegant Merchandising, Inc.*, 41 B.R. 398 (Bankr. S.D.N.Y. 1984), the court denied the debtor's request to enjoin a bank from making a payment under a letter of credit to another party, on the grounds the proceeds of the letter of credit did not constitute property of the debtor's estate but rather property of the issuing bank. Other courts have similarly held that letters of credit in the context of a lease fall outside the debtor's estate because they are contractual agreements involving an issuing bank and beneficiary that are independent of the obligations between the beneficiary and debtor.

For example, in *In re Stonebridge Technologies, Inc.*, 430 F.3d 260 (5th Cir. 2005), the Fifth Circuit Court of Appeals held that a letter of credit was not subject to the Code because the letter of credit was an obligation between the issuing bank and landlord and the contractual rights and duties between those parties were entirely separate from the debtor's estate. The court also ruled that inasmuch as the landlord did not file a proof of claim against the debtor's ***57** estate and was not seeking lease rejection damages pursuant to the Code, the statutory cap was not triggered. But *In re Builders Transport, Inc.*, 471 F.3d 1178 (11th Cir. 2006), a similar case in which the landlord did not file a proof of claim and its assignee drew down a letter of credit, the 11th Circuit Court of Appeals ruled that the assignee nonetheless was not entitled to retain the funds pursuant to the underlying lease language and because the allowed damages did not exceed the section 502(b)(6) cap. The Third Circuit Court of Appeals took a different approach in *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197 (3d Cir. 2003), by holding that a letter of credit was subject to the statutory cap on the basis the parties intended the letter of credit to operate as a security deposit as reflected in specific lease provisions, notwithstanding the landlord's argument that the letter of credit was not the functional equivalent of a security deposit and that he had a contractual right to the letter of credit's proceeds.

Because of the split in appellate authority, attorneys should carefully evaluate the applicable case law in the jurisdiction in which the leased premises are located (in addition to any other state law chosen by the parties in the lease), before determining how best to handle the letter of credit during a bankruptcy proceeding. Attorneys also should examine any standard form leases used by their clients that may or may not include letters of credit provisions. Depending upon the applicable case law, it might be appropriate to draft a landlord's standard lease language to maximize the landlord's right to draw down and retain the proceeds of a letter of credit for lease defaults and in the event of a tenant's bankruptcy. In general, landlords should consider requiring letters of credit in situations where the rent will be substantial, the tenant is a start-up enterprise, the landlord has concerns about the tenant's ability to pay monthly rent for a long-term lease (i.e., five years or more), and the security deposit will be large (e.g., greater than $50,000).

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Turnover--Not So Fast

Another issue a landlord might face involves potentially transferring the security deposit to a court-appointed trustee, especially if the security deposit is large and appears to exceed the amount of the allowed claim. Section 542 permits a court-appointed trustee to seek the transfer (or turnover) of property of the debtor's estate held by a third party to the trustee. Nevertheless, given the interests of the landlord in a security deposit, a trustee may not automatically order or require a landlord to reimburse, pay, or turn over the security deposit to the bankruptcy estate post-petition. A landlord that contests the right to a security deposit may succeed in preventing such a turnover because section 542 permits turnover only of property that is indisputably property of the bankruptcy estate.

For example, in *In re Lexington Healthcare Group, Inc.*, 363 B.R. 713 (Bankr. D. Del. 2007), a nursing home landlord held a security deposit of over $2.2 million at the time the tenant filed for Chapter 11 bankruptcy protection. The lease provided that the security deposit was to be applied toward any damages incurred by the landlord on account of a default by the tenant of the terms of the lease or credited against any rent due on the final month of the lease term. After filing its bankruptcy petition, the debtor rejected the lease and the landlord retained the security deposit. The case was subsequently converted into a Chapter 7 (liquidation) proceeding, and a trustee was appointed. More than three years after the case was initially filed, the trustee filed a complaint against the landlord pursuant to section 542, seeking turnover of the security deposit. The landlord filed a motion to dismiss the complaint on the grounds section 542 only permits turnover for undisputed property of the bankruptcy estate, the landlord had a bona fide dispute with respect to the security deposit, and that, as a result, the trustee's claim for turnover was precluded as a matter of law.

The court agreed with the landlord that because title to the deposit was in dispute, the trustee could not seek a turnover of those funds. The court held that where there is a legitimate dispute about the ownership of property a trustee seeks to recover, turnover under the Code is inappropriate. Moreover, the court found that the lease was silent regarding the landlord's entitlement to the security deposit if there were no damages or unpaid rent, and that the lease was not so plain and unambiguous as to provide a clear, objective basis for concluding that the security deposit was property of the estate. The court further found that it was not clear whether the landlord had a claim against the security deposit for damages or unpaid rent.

Based upon *Lexington Healthcare*, a landlord facing lease rejection by a tenant arguably may retain the security deposit until and unless required by court order to turn it over. A landlord's case will be strengthened to the extent there is unpaid rent and other damages, including property damage, resulting from any uncured lease default. It also goes without saying that any commercial lease should contain language entitling the landlord to the security deposit for unpaid rent and other lease defaults. Further, *Lexington Healthcare* suggests it would be advisable for a landlord to condition the return of the security deposit on the tenant's satisfactory compliance with all of the conditions of the lease, not just timely payment of rent.

To conclude, in light of the current financial crisis and tightening credit markets, it is increasingly important for commercial landlords and their attorneys to be prepared for an upswing in bankruptcy filings by distressed tenants. Attorneys should have a basic understanding of the types of claims their clients may assert during a bankruptcy, the limitations on those claims under the Code and applicable case law, and some of the more practical issues that might arise while a tenant is undergoing reorganization and that relate to the lease and security deposit.

Footnotes

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RESIDENTIAL REAL ESTATE TRACK

Martin A. Schwartz, Partner at Bilzin Sumberg Baena Price & Axelrod LLP

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SPEAKER INFORMATION

AIR RIGHTS

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Martin A. Schwartz is a partner in the Miami firm, Bilzin Sumberg Baena Price & Axelrod LLP, and a member of its Real Estate Practice Group. Mr. Schwartz is a graduate of New York University School of Law, LLB 1967 and LLM 1968, and was admitted to the New York Bar in 1968 and the Florida Bar in 1981.

His practice consists of the full range of real estate law, including acquisitions, sales, financing and leasing. He also heads the firm's condominium practice and is a member of Committees on Condominium and Planned Unit Development and Commercial Real Estate of the Real Property Probate and Trust Law Section of The Florida Bar.

Mr. Schwartz is a frequent lecturer, and has released several publications including "Termination of Condominium Terminations?," *Florida Bar Journal*, December 2015; "It's Up in the Air: Air Rights in Modern Development," *Florida Bar Journal*, April, 2015, reprinted in RPTE eReport, May 2015; "The End of Federal Regulation of Condominium Sales?," *Multi-Housing News*, December 11, 2014; and many others.

AIR RIGHTS IN MODERN DEVELOPMENT

By: Martin A. Schwartz
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Miami, FL

I. Background

A. *Romans*. First to enunciate ownership of air space:

"culus est solum, clus est usque ad coelom"

(Roughly translated as: ownership of soil extends to the sky)

B. *English. Picked up* "ad coelom" *concept as part of common law.*

C. *Americans*. Limited *"ad coelom"* doctrine to accommodate air travel in United States v. Causby, 328 U.S. 256 (1946).

II. Separation of Air Rights from Ownership of Land

A. In Florida, no clear authority on conveying strata of airspace separate from ground except as a condominium unit

1. A few other states permit deeds of air space

2. Air rights may also be transferred by the lease of air space

B. Zoning laws in effect allow transfers of airspace between properties for development (density) purposes

1. Adjoining properties - can be combined into single zoning lot

2. Non-adjoining properties: Transfers of Development Rights

(a) Purchase from municipality

(b) Purchase from historic properties

3. Easements over public rights of way

III. **Subdivision of Air**

A. *Condominium Law*.

1. Section 718.103(18) of Florida Statutes.

2. Master Condominium - Section 718.406

B. *Declaration of Covenants*. Need to create the universe in which the project operates and address all of the following concerns in creating air rights parcels:

1. Which element will control entire development.

2. All elements may need easements for:

(a) Access

(b) Utilities

(c) Support

3. How is casualty handled?

4. Creation and allocation of assessments for shared portions of structure

IV. **Areas of Development Concern in Air Space Development**

A. Potential FAA approval

B. Separate tax folio numbers - lollipop parcels

V. **Issues to Consider in Purchase of Air Rights Parcel**

A. Obtain necessary easements

B. Who controls project

C. How is casualty handled

D. Use of amenities such as parking

VI. Constructive Use of Air Rights in Development

A. Park Avenue in New York City

B. Metropolitan Life Building (formerly the Pan Am Building) in New York City

C. Prudential Building in Chicago

D. George Washington Bridge Approach

E. Hudson Yards

EXHIBITS

1. *United States v. Causby,* 328 U.S. 256 (1946)

2. *Sovereignty and Use of Airspace, 49 U.S.C.A. 40103*

3. *Section 718.103(18) of Florida Statutes*

4. *23 U.S.C. § 111(a)*

5. *American Society of Planning Officials,* May 1964

6. *Airspace Conveyance Policy Changes, New York Law Journal,* June 22, 2009

7. Underwriting Manual for Airspace and Air Rights

8. *Air Rights Sales Soaring, Miami Today*, December 3, 2014

9. *FAA Approves Skyrise Height, The Next Miami, February 24, 2016*

10. *Tibor Hollo Wants to Build Taller Panorama Tower*

11. *Hudson Yards,* New York, New York

12. *Sometimes the Only Way to Go is Up, Detroit Free Press,* February 7, 2007

13. *It's Up in the Air: Air Rights in Modern Development; Florida Bar Journal,* December 2015

EXHIBIT 1

U.S. v. Causby, 328 U.S. 256 (1946)
66 S.Ct. 1062, 90 L.Ed. 1206

66 S.Ct. 1062
Supreme Court of the United States

UNITED STATES
v.
CAUSBY et ux.

No. 630. | Argued May 1, 1946. | Decided May 27, 1946.

Action by Thomas Lee Causby and wife, Tinie Causby, against the United States, to recover for the alleged taking by defendant of plaintiffs' home and chicken farm which was adjacent to a municipal airport leased by the defendant. To review a judgment of the Court of Claims in favor of the plaintiffs, 60 F.Supp. 751, the United States brings certiorari.

Reversed and remanded.

Mr. Justice BLACK and Mr. Justice BURTON dissenting.

On Writ of Certiorari to the Court of Claims.

Military airplanes are subject to rules of Civil Aeronautics Board where there are no army or navy regulations to the contrary.

West Headnotes (14)

[1] **Armed Services**
Relation of Military to Civil Authority
Aviation
Rules and regulations
Military airplanes are subject to rules of Civil Aeronautics Board where there are no army or navy regulations to the contrary.

1 Cases that cite this headnote

[2] **Eminent Domain**
Taking Entire Tract or Piece of Property
The owner's loss, and not the taker's gain, is the measure of value of condemned property. U.S.C.A. Const.Amend. 5.

19 Cases that cite this headnote

[3] **Eminent Domain**
Taking Entire Tract or Piece of Property
Eminent Domain
Value for special use
Market value fairly determined is the normal measure of recovery in condemnation proceeding, and that value may reflect the use to which the property could readily be converted as well as the existing use. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[4] **Eminent Domain**
Easements and other rights in real property
Where federal Government permitted its airplanes to fly so low over plaintiffs' land which adjoined municipal airport in North Carolina leased by federal Government as to deprive plaintiffs of use and enjoyment of their land for purpose of raising chickens, there was a "taking", so as to entitle plaintiffs to recover just compensation. Air Commerce Act of 1926, §§ 1 et seq., 6(a), 10 as amended 49 U.S.C.A. §§ 171 et seq., 176(a), 180; Civil Aeronautics Act of 1938, §§ 1 et seq., 1(3), 3, 49 U.S.C.A. §§ 401 et seq., 401(3), 403; U.S.C.A. Const.Amend. 5; G.S.N.C. §§ 63–11 to 63–13.

77 Cases that cite this headnote

[5] **Eminent Domain**
Easements and other rights in real property
The fact that path of glide taken by airplanes in taking off and landing over plaintiffs' land, which adjoined municipal airport leased by federal Government, was approved by Civil Aeronautics Authority, did not prevent the flights over plaintiffs' land from constituting a "taking" entitling plaintiffs to just compensation, since the path of glide is not the "minimum safe altitude of flight" prescribed by Civil Air Regulations as the downward reach of navigable air space placed within public domain by Congress. Air

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Commerce Act of 1926, § 10, 49 U.S.C.A. § 180; U.S.C.A. Const.Amend. 5.

260 Cases that cite this headnote

[6] **Property**
Ownership and incidents thereof

Landowner owns at least as much of the air space above the ground as he can occupy or use in connection with the land, and fact that he does not occupy it in a physical sense by erection of buildings and the like is not material.

32 Cases that cite this headnote

[7] **Eminent Domain**
Statutory Provisions and Remedies

The meaning of "property" as used in Fifth Amendment prohibiting the taking of private property for public use without just compensation, is a "federal question," but it will normally obtain its content by reference to local law. U.S.C.A. Const.Amend. 5.

26 Cases that cite this headnote

[8] **Eminent Domain**
Statutory Provisions and Remedies

A holding that flights by airplanes at low levels over plaintiffs' land, which adjoined municipal airport in North Carolina leased by federal Government, deprived plaintiffs of use and enjoyment of their land and constituted a "taking," so as to entitle them to just compensation, was not inconsistent with local law of North Carolina governing land owner's claim to immediate reaches of the superadjacent air-space. G.S.N.C. §§ 63–11 to 63–13; U.S.C.A. Const.Amend. 5.

157 Cases that cite this headnote

[9] **Eminent Domain**
Easements and other rights in real property

Flights by airplanes of federal Government over private lands are not a "taking", so as to entitle owner to just compensation, unless they are so low and so frequent as to be direct and immediate interference with the enjoyment and use of the land. Air Commerce Act of 1926, §§ 1 et seq., 6(a), 10 as amended 49 U.S.C.A. §§ 171 et seq., 176(a), 180; Civil Aeronautics Act of 1938, §§ 1 et seq., 1(3), 3, 49 U.S.C.A. §§ 401 et seq., 401(3), 403; U.S.C.A. Const.Amend. 5.

146 Cases that cite this headnote

[10] **United States**
Takings claims

A claim for taking of private land by federal Government is a "claim founded upon the Constitution" and within jurisdiction of the Court of Claims to determine. Jud.Code, § 145(1), 28 U.S.C.A. § 1491; U.S.C.A. Const.Amend. 5.

55 Cases that cite this headnote

[11] **Federal Courts**
Review of specialized federal courts

On certiorari from United States Supreme Court to Court of Claims, deficiency in findings of fact by Court of Claims cannot be rectified by statements in its opinion. 28 U.S.C.A. § 1255.

9 Cases that cite this headnote

[12] **Federal Courts**
Review of specialized federal courts

On certiorari from United States Supreme Court to Court of Claims, Supreme Court would not examine evidence to determine whether it would support a finding of fact, if such finding had been made by Court of Claims. 28 U.S.C.A. § 1255.

12 Cases that cite this headnote

[13] **Federal Courts**
Review of specialized federal courts

In action against federal Government for alleged taking of plaintiffs' chicken farm, which was adjacent to municipal airport leased by federal Government as result of Government permitting its airplanes to fly so low over land as to destroy plaintiffs' use and enjoyment thereof, where Court of Claims held that an easement was taken, but its findings of fact contained no description

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as to whether the easement taken was permanent or temporary, it would be premature for Supreme Court to consider whether amount of award made by Court of Claims was proper. 28 U.S.C.A. § 1255; U.S.C.A. Const.Amend. 5.

38 Cases that cite this headnote

[14] **Eminent Domain**
Value for special use

Market value to which owner of condemned land is entitled may reflect not only use to which property is presently devoted but also that use to which it may be readily converted.

6 Cases that cite this headnote

Attorneys and Law Firms

****1064** ***257** Mr. Walter J. Cummings, Jr., of Washington, D.C., for petitioner.

Mr. William E. Comer, of Greensboro, N.C., for respondent.

Opinion

***258** Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking and entered judgment for respondent, one judge dissenting. 60 F.Supp. 751. The case is here on a petition for a writ of certiorari which we granted becuase of the importance of the question presented.

[1] Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina. It has on it a dwelling house, and also various outbuildings which were mainly used for raising chickens. The end of the airport's northwest-southeast runway is 2,220 feet from respondents' barn and 2,275 feet from their house. The path of glide to this runway passes directly over the property—which is 100 feet wide and 1,200 feet long. The 30 to 1 safe glide angle [1] approved by the Civil Aeronautics Authority [2] passes over this property at 83 feet, which is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree. [3] The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six ***259** months after the end of the national emergency, whichever is the earlier.

Various aircraft of the United States use this airport—bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The north-west-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the ****1065** planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was $2,000.

***260** I. The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. s 171 et seq., 49 U.S.C.A. s 171 et seq., as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. s 401 et seq., 49 U.S.C.A. s 401 et seq. Under those statutes the United States has 'complete and exclusive national sovereignty in the air space' over this country. 49 U.S.C. s 176(a), 49 U.S.C.A. s 176(a). They grant any citizen of the United States 'a public right of freedom of transit in air commerce [4] through the navigable air space of the United States.' 49 U.S.C.

s 403, 49 U.S.C.A. s 403. And 'navigable air space' is defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. And it is provided that 'such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation.' Id. It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—Cujus ***261** est solum ejus est usque ad coelum.[5] But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

[2] **[3]** But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the ****1066** taker's gain, which is the measure of the value of the property taken. United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55. Market value fairly determined is the normal measure of the recovery. Id. And that value may reflect the use to which the land could readily be converted, as well as the existing use. United States v. Powelson, 319 U.S. 266, 275, 63 S.Ct. 1047, 1053, 87 L.Ed. 1390, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete.[6] It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

[4] We agree that in those circumstances there would be a taking. Though it would be only an easement of flight ***262** which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance such as was involved in Richards v. Washington Terminal Co., 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088, L.R.A.1915A, 887. In that case property owners whose lands adjoined a railroad line were denied recovery for damages resulting from the noise, vibrations, smoke and the like, incidental to the operations of the trains. In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[7] That was the philosophy of ***263** Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. In that case the petition alleged that the United States erected a fort on nearby land, established a battery and a fire control station there, and fired guns over petitioner's land. The Court, speaking through Mr. Justice Holmes, reversed the Court of Claims which dismissed the petition on a demurrer, holding that 'the specific facts set forth would warrant a finding that a servitude has been imposed.'[8] ****1067** 260 U.S. at page 330, 43 S.Ct. at page 137, 67 L.Ed. 287. And see Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245, 140 A.L.R. 1352. Cf. United States v. 357.25 Acres of Land, D.C., 55 F.Supp. 461.

[5] The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress

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has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating —of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61, ss 61.7400, 61.7401, Code Fed.Reg.Cum.Supp., Tit. 14, ch. 1) and from 300 to 1000 feet for ***264** other aircraft depending on the type of plane and the character of the terrain. Id., Pt. 60, ss 60.350-60.3505, Fed.Reg.Cum.Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

[6] We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.[9] The landowner owns at least as much of the space above the ground as the can occupy or use in connection with the land. See Hinman v. Pacific Air Transport, 9 Cir., 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected ***265** an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.[10] The reason is that there would be ****1068** an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.[11]

In this case, as in Portsmouth Harbor Land & Hotel Co. v. United States, supra, the damages were not merely consequential. They were the product of a direct invasion of respondents' domain. ***266** As stated in United States v. Cress, 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746, '* * * it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.'

[7] [8] We said in United States v. Powelson, supra, 319 U.S. at page 279, 63 S.Ct. at page 1054, 87 L.Ed. 1390, that while the meaning of 'property' as used in the Fifth Amendment was a federal question, 'it will normally obtain its content by reference to local law.' If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State 'except where granted to and assumed by the United States.' Gen.Stats. 1943, s 63-11. The flight of aircraft is lawful 'unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.' Id., s 63-13. Subject to that right of flight, 'ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath.' Id. s 63-12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

[9] The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking,

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unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court *267 of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

[10] II. By s 145(1) of the Judicial Code, 28 U.S.C. s 250(1), 28 U.S.C.A. s 250(1), the Court of Claims has jurisdiction to hear and determine 'All claims (except for pensions) founded upon the Constitution of the United States or * * * upon any contract, express or implied, with the Government of the United States.'

We need not decide whether repeated trespasses might give rise to an implied contract. Cf. Portsmouth Harbor Land & Hotel Co. v. United States, supra. If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction **1069 of the Court of Claims to hear and determine. See Hollister v. Benedict & Burnham Mfg. Co., 113 U.S. 59, 67, 5 S.Ct. 717, 721, 28 L.Ed. 901; Hurley v. Kincaid, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637; Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 21, 60 S.Ct. 413, 415, 84 L.Ed. 554. Thus, the jurisdiction of the Court of Claims in this case is clear.

[11] [12] III. The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States. United States v. Cress, supra, 243 U.S. 328, 329, 37 S.Ct. 385, 386, 61 L.Ed. 746, and cases cited. It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion. United States v. Esnault-Pelterie, 299 U.S. 201, 205, 206, 57 S.Ct. 159, 161, 162, 81 L.Ed. 123; United States v. Seminole Nation, 299 U.S. 417, 422, 57 S.Ct. 283, 287, 81 L.Ed. 316. Findings of fact on every 'material issue' are a statutory *268 requirement. 53 Stat. 752, 28 U.S.C. s 288, 28 U.S.C.A. s 288. The importance of findings of fact based on evidence is emphasized here by the Court of Claims' treatment of the nature of the easement. It stated in its opinion that the easement was permanent because the United States 'no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so.' (60 F.Supp. 758.) That sounds more like conjecture rather than a conclusion from evidence; and if so, it would not be a proper foundation for liability of the United States. We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. United States v. Esnault-Pelterie, supra, 299 U.S. at page 206, 57 S.Ct. at page 162, 81 L.Ed. 123.

[13] Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper.

The judgment is reversed and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

The Fifth Amendment provides that 'private property' shall not 'be taken for public use, without just compensation.' The Court holds today that the Government has 'taken' respondents' property by repeatedly flying Army bombers directly above respondents' land at a height of eighty-three feet where the light and noise from these planes caused respondents to lose sleep and their chickens to be killed. Since the effect of the Court's decision is *269 to limit, by the imposition of relatively absolute Constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since in my view the Constitution does not contain such barriers, I dissent.

The following is a brief statement of the background and of the events that the Court's opinion terms a 'taking' within the meaning of the Fifth Amendment: Since 1928 there has been an airfield some eight miles from Greensboro, North Carolina. In April, 1942, this airport was taken over by the Greensboro-High Point Municipal Airport Authority and it has since then operated as a municipal airport. In 1942 the Government, by contract, obtained the right to use the field 'concurrently, **1070 jointly, and in common' with other users. Years before, in 1934, respondents had bought their

property, located more than one-third of a mile from the airport. Private planes from the airport flew over their land and farm buildings from 1934 to 1942 and are still doing so. But though these planes disturbed respondents to some extent, Army bombers, which started to fly over the land in 1942 at a height of eighty-three feet, disturbed them more because they were larger, came over more frequently, made a louder noise, and at night a greater glare was caused by their lights. This noise and glare disturbed respondents' sleep, frightened them, and made them nervous. The noise and light also frightened respondents' chickens so much that many of them flew against buildings and were killed.

The Court's opinion seems to indicate that the mere flying of planes through the column of air directly above respondents' land does not constitute a 'taking'. Consequently, it appears to be noise and glare, to the extent and under the circumstances shown here, which make the government a seizer of private property. But the allegation ***270** of noise and glare resulting in damages, constitutes at best an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute, [1] or were the result of negligence. [2] But the Government has not consented to be sued in the Court of Claims except in actions based on express or implied contract. And there is no implied contract here, unless by reason of the noise and glare caused by the bombers the Government can be said to have 'taken' respondents' property in a Constitutional sense. The concept of taking property as used in the Constitution has heretofore never been given so sweeping a meaning. The Court's opinion presents no case where a man who makes noise or shines light onto his neighbor's property has been ejected from that property for wrongfully taking possession of it. Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property. Even the one case in this Court which in considering the sufficiency of a complaint gave the most elastic meaning to the phrase 'private property be taken' as used in the Fifth Amendment, did not go so far. ***271** Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. I am not willing, nor do I think the Constitution and the decisions authorize me, to extend that phrase so as to guarantee an absolute Constitutional right to relief not subject to legislative change, which is based on averments that at best show mere torts committed by Government agents while flying over land. The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it, with Congress.

Nor do I reach a different conclusion because of the fact that the particular circumstance which under the Court's opinion makes the tort here absolutely actionable, ****1071** is the passing of planes through a column of air at an elevation of eighty-three feet directly over respondents' property. It is inconceivable to me that the Constitution guarantees that the airspace of this Nation needed for air navigation, is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below. [3] No rigid Constitutional rule, in my judgment, commands that the air must be considered as marked off into separate compartments by imaginary metes and bounds in order to synchronize air ownership with land ownership. I think that the Constitution entrusts Congress with full power to control all navigable airspace. Congress has already acted under that power. It has by statute, 44 Stat. 568, 52 Stat. 973, provided that 'the United States of America is * * * to possess and exercise complete and exclusive national sovereignty in the ***272** air space (over) the United States.' This was done under the assumption that the Commerce Clause of the Constitution gave Congress the same plenary power to control navigable airspace as its plenary power over navigable waters. H. Rep. No. 572, 69th Cong., 1st Sess., p. 10; H. Rep. No. 1162, 69th Cong., 1st Sess., p. 14; United States v. Commodore Park, Inc., 324 U.S. 386, 65 S.Ct. 803, 89 L.Ed. 1017. To make sure that the airspace used for air navigation would remain free, Congress further declared that 'navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation,' and finally stated emphatically that there exists 'a public right of freedom of transit * * * through the navigable airspace of the United States.' Congress thus declared that the air is free, not subject to private ownership, and not subject to delimitation by the courts. Congress and those acting under its authority were the only ones who had power to control and regulate the flight of planes. 'Navigable air-space' was defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. Thus, Congress has given the Civil Aeronautics Authority exclusive power to determine what is navigable airspace subject to its exclusive control. This power derives specifically from the Section which authorizes the Authority to prescribe 'air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes

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of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.' 49 U.S.C.A. s 551. Here there was no showing that the bombers flying over respondents' land violated any rule or regulation of the Civil Aeronautics Authority. Yet, unless we hold the Act unconstitutional, at least such a showing would be necessary before the courts could act without interfering with the exclusive authority which Congress gave to the administrative agency. Not even a ***273** showing that the Authority has not acted at all would be sufficient. For in that event, were the courts to have any authority to act in this case at all, they should stay their hand till the Authority has acted.

The broad provisions of the Congressional statute cannot properly be circumscribed by making a distinction as the Court's opinion does between rules of safe altitude of flight while on the level of cross-country flight and rules of safe altitude during landing and taking off. First, such a distinction can not be maintained from the practical standpoint. It is unlikely that Congress intended that the Authority prescribe safe altitudes for planes making cross-country flights, while at the same time it left the more hazardous landing and take-off operations unregulated. The legislative history, ****1072** moreover, clearly shows that the Authority's power to prescribe air traffic rules includes the power to make rules governing landing and take-off. Nor is the Court justified in ignoring that history by labeling rules of safe altitude while on the level of cross-country flight as rules prescribing the safe altitude proper and rules governing take-off and landing as rules of operation. For the Conference Report explicitly states that such distinctions were purposely eliminated from the original House Bill in order that the Section on air traffic rules 'might be given the broadest construction by the * * * (Civil Aeronautics Authority) * * * and the courts.'[4] In construing the statute narrowly the Court ***274** thwarts the intent of Congress. A proper broad construction, such as Congress commanded, would not permit the Court to decide what it has today without declaring the Act of Congress unconstitutional. I think the Act given the broad construction intended is constitutional.

No greater confusion could be brought about in the coming age of air transportation than that which would result were courts by Constitutional interpretation to hamper Congress in its efforts to keep the air free. Old concepts of private ownership of land should not be introduced into the field of air regulation. I have no doubt that Congress will, if not handicapped by judicial interpretations of the Constitution, preserve the freedom of the air, and at the same time, satisfy the just claims of aggrieved persons. The noise of newer, larger, and more powerful planes may grow louder and louder and disturb people more and more. But the solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid Constitutional restraints formulated and enforced by the courts. What adjustments may have to be made, only the future can reveal. It seems certain, however, ***275** the courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems. The contribution of courts must be made through the awarding of damages for injuries suffered from the flying of planes, or by the granting of injunctions to prohibit their flying. When these two simple remedial devices are elevated to a Constitutional level under the Fifth Amendment, as the Court today seems to have done, they can stand as obstacles to better adapted techniques that might be offered by experienced experts and accepted by Congress. Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital and national problems. In my opinion ****1073** this case should be reversed on the ground that there has been no 'taking' in the Constitutional sense.

Mr. Justice BURTON joins in this dissent.

Parallel Citations

66 S.Ct. 1062, 90 L.Ed. 1206

Footnotes

1 A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.

2 Military planes are subject to the rules of the Civil Aeronautics Board where, as in the present case, there are no Army or Navy regulations to the contrary. Cameron v. Civil Aeronautics Board, 7 Cir., 140 F.2d 482.

3 The house is approximately 16 feet high, the barn 20 feet, and the tallest tree 65 feet.

4 'Air commerce' is defined as including 'any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.' 49 U.S.C. s 401(3), 49 U.S.C.A. s 401(3).

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5 1 Coke, Institutes, 19th Ed. 1832, ch. 1, s 1(4a); 2 Blackstone, Commentaries, Lewis Ed. 1902, p. 18; 3 Kent, Commentaries, Gould Ed. 1896, p. 621.

6 The destruction of all uses of the property by flooding has been held to constitute a taking. Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L.Ed. 557; United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; United States v. Welch, 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787, 28 L.R.A.,N.S., 385, 19 Ann.Cas. 680.

7 It was stated in United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 156 A.L.R. 390, 'The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.' The present case falls short of the General Motors case. This is not a case where the United States has merely destroyed property. It is using a part of it for the flight of its planes.
Cf. Warren Township School Dist. v. Detroit, 308 Mich. 460, 14 N.W.2d 134; Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300; Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575.

8 On remand the allegations in the petition were found not to be supported by the facts. 64 Ct.Cl. 572.

9 Baten's Case, 9 Coke R. 53b; Meyer v. Metzler, 51 Cal. 142; Codman v. Evans, 7 Allen 431, 89 Mass. 431; Harrington v. McCarthy, 169 Mass. 492, 48 N.E. 278, 61 Am.St.Rep. 298. See Ball, The Vertical Extent of Ownership in Land, 76 U.Pa.L.Rev. 631, 658—671.

10 It was held in Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716, 11 L.R.A.,N.S., 920, 116 Am.St.Rep. 563, 9 Ann.Cas. 858, that ejectment would lie where a telephone wire was strung across the plaintiff's property, even though it did not touch the soil. The court stated pages 491, 492 of 186 N.Y., page 718 of 79 N.E.: '* * * an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.'

11 See Bouve, Private Ownership of Navigable Airspace Under the Commerce Clause, 21 Amer.Bar Assoc.Journ. 416, 421—422; Hise, Ownership and Sovereignty of the Air, 16 Ia.L.Rev. 169; Eubank, The Doctrine of the Airspace Zone of Effective Possession, 12 Boston Univ.L.Rev. 414.

1 Neiswonger v. Goodyear Tire & Rubber Co., D.C., 35 F.2d 761.

2 As to the damage to chickens, Judge Madden, dissenting from this judgment against the Government said, 'When railroads were new, cattle in fields in sight and hearing of the trains were alarmed, thinking that the great moving objects would turn aside and harm them. Horses ran away at the sight and sound of a train or a threshing machine engine. The farmer's chickens have to get over being alarmed at the incredible racket of the tractor starting up suddenly in the shed adjoining the chicken house. These sights and noises are a part of our world, and airplanes are now and will be to a greater degree, likewise a part of it. These disturbances should not be treated as torts, in the case of the airplane, any more than they are so treated in the case of the railroad or public highway.'

3 The House in its report on the Air Commerce Act of 1926 stated: 'The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of adjacent or subjacent soil'. House Report No. 572, 69th Congress, First Session, page 10.

4 The full statement read: 'The substitute provides that the Secretary shall by regulation establish air traffic rules for the navigation, protection, and identification of all aircraft, including rules for the safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft. The provision as to rules for taking off and alighting, for instance, was eliminated as unnecessary specification, for the reason that such rules are but one class of air traffic rules for the navigation and protection of aircraft. Rules as to marking were eliminated for the reason that such rules were fairly included within the scope of air rules for the identification of aircraft. No attempt is made by either the Senate bill or the House amendment to fully define the various classes of rules that would fall within the scope of air traffic traffic rules, as, for instance, lights and signals along airways and at air-ports and upon emergency landing fields. In general, these rules would relate to the same subjects as those covered by navigation laws and regulations and by the various State motor vehicle traffic codes. As noted above, surplusage was eliminated in specifying particular air traffic rules in order that the term might be given the broadest possible construction by the Department of Commerce and the courts.' House Report No. 1162, 69th Congress, 1st Session, p. 12.
That the rules for landing and take-off are rules prescribing 'minimum safe altitudes of flight' is shown by the following further statement in the House Report: '* * * the minimum safe altitudes of flight * * * would vary with the terrain and location of cities and would coincide with the surface of the land or water at airports.' Id. at p. 14.

EXHIBIT 2

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety (Refs & Annos)
Subpart I. General
Chapter 401. General Provisions (Refs & Annos)

49 U.S.C.A. § 40103

§ 40103. Sovereignty and use of airspace

Currentness

(a) Sovereignty and public right of transit.--(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.

(b) Use of airspace.--(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for--

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(3) To establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security, the Administrator, in consultation with the Secretary of Defense, shall--

(A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; and

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(B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.

(4) Notwithstanding the military exception in section 553(a)(1) of title 5, subchapter II of chapter 5 of title 5 applies to a regulation prescribed under this subsection.

(c) Foreign aircraft.--A foreign aircraft, not part of the armed forces of a foreign country, may be navigated in the United States as provided in section 41703 of this title.

(d) Aircraft of armed forces of foreign countries.--Aircraft of the armed forces of a foreign country may be navigated in the United States only when authorized by the Secretary of State.

(e) No exclusive rights at certain facilities.--A person does not have an exclusive right to use an air navigation facility on which Government money has been expended. However, providing services at an airport by only one fixed-based operator is not an exclusive right if--

(1) it is unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide the services; and

(2) allowing more than one fixed-based operator to provide the services requires a reduction in space leased under an agreement existing on September 3, 1982, between the operator and the airport.

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1101.)

Notes of Decisions (66)

49 U.S.C.A. § 40103, 49 USCA § 40103
Current through P.L. 113-163 (excluding P.L. 113-128) approved 8-8-14

End of Document

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EXHIBIT 3
Florida Statute 718.103(18)

718.103 Definitions.—As used in this chapter, the term:

(18) "Land" means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface. However, if so defined in the declaration, the term "land" may mean all or any portion of the airspace or subterranean space between two legally identifiable elevations and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit.

Exhibit 4

23 U.S.C.
United States Code, 2011 Edition
Title 23 - HIGHWAYS
CHAPTER 1 - FEDERAL-AID HIGHWAYS
Sec. 111 - Agreements relating to use of and access to rights-of-way-Interstate System
From the U.S. Government Printing Office, www.gpo.gov

§111. Agreements relating to use of and access to rights-of-way—Interstate System

(a) In General.—All agreements between the Secretary and the State transportation department for the construction of projects on the Interstate System shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project, without the prior approval of the Secretary. Such agreements shall also contain a clause providing that the State will not permit automotive service stations or other commercial establishments for serving motor vehicle users to be constructed or located on the rights-of-way of the Interstate System. Such agreements may, however, authorize a State or political subdivision thereof to use or permit the use of the airspace above and below the established grade line of the highway pavement for such purposes as will not impair the full use and safety of the highway, as will not require or permit vehicular access to such space directly from such established grade line of the highway, or otherwise interfere in any way with the free flow of traffic on the Interstate System. Nothing in this section, or in any agreement entered into under this section, shall require the discontinuance, obstruction, or removal of any establishment for serving motor vehicle users on any highway which has been, or is hereafter, designated as a highway or route on the Interstate System (1) if such establishment (A) was in existence before January 1, 1960, (B) is owned by a State, and (C) is operated through concessionaries or otherwise, and (2) if all access to, and exits from, such establishment conform to the standards established for such a highway under this title.

EXHIBIT 5

AMERICAN SOCIETY OF PLANNING OFFICIALS

1313 EAST 60TH STREET — CHICAGO 37 ILLINOIS

Information Report No. 186 May 1964

Air Rights

Prepared by Leopold A. Goldschmidt

The incentive to develop structures on air rights is a result of two interrelated aspects of urban growth — rising land values and expanding transportation facilities. The effect of these is strongest in the central business district where land values are highest and where transportation systems are generally focused.

In the CBD numerous functions are concentrated in an area characterized by high land coverage and multi-story structures. As the retail, administrative and financial center of the city, and frequently of the region, its smooth operation depends on rapid and constant communication among its internal components as well as with the outside world. The dilemma of downtown can thus be described in terms of the conflicting demands on land made by high-density developments and space- consuming transportation facilities, a competition that has tended to become more severe in recent years.

While the present ubiquity of the automobile may have detracted from the transportation functions of the railroads, it has not reduced railroad land holdings. Thus, the city core has to accommodate — in addition to the vast acreage of the railroads — streets, expressways, interchanges, parking lots and garages. Today, this problem is not entirely confined to the downtown. The competition for building space may also be found in outlying areas.

It is natural, then, that attempts have been made to reclaim some of the land lost to transportation by building over railroads and thoroughfares, even though such development raises construction costs. While the shortage of urban land, especially in prime locations, provides the incentive for such developments, the high value of this land for building space assures their economic feasibility.

Improvements straddling transportation facilities and under separate ownership are really not new. The first air rights construction, the New York Central Terminal air rights development in New York City, was started in 1908 and completed in 1913. Electrification enabled the railroad to cover its tracks into Grand Central Terminal with a street and flanking apartment and office buildings. This became Park Avenue and by 1929, 18 skyscrapers had been built over the tracks. The most recent construction project in this area was the new 59-story Pan American building.

Air rights projects have been built in other cities although on a smaller scale than in New York. But based on the number of recent inquiries to ASPO Planning Advisory Service, interest in air rights developments has increased considerably. This report will review past and proposed

projects, discuss problems that a planning agency must face in dealing with such projects, and summarize action by governmental bodies to regulate air rights developments.

Background

In principle, air rights go back to early English common law, with its basis in the Latin legal maxim: *cujus est solum ejus est usque ad coelum et ad inferos* — to whomever the soil belongs, he also owns to the sky and to the depths. This traditional concept of land ownership described the parcel as an inverted pyramid starting at the center of the earth and reaching to the periphery of the universe. Recently, the requirements of aviation have abrogated private property rights to the extent that the use of the air as a public highway has pre-empted them. However, there is a definite downward limit for this new highway that has become dedicated to public use: "...The landowner owns at least as much of the space above ground as he can occupy or use in connection with the land."[1] Air rights construction has obviously extended the upward use of property beyond the limits once envisioned.[2]

Definition

Air rights, as usually defined, comprise the rights vested in the ownership of all the property at and above a certain horizontal plane as well as caisson and column lots essential to contain the structural supports of the air rights improvement. This means in effect a horizontal division of real property, with the parts under separate ownership and involving an allocation of responsibilities and rights. The utilization of air rights consists of construction "in space", above an existing surface use. Thus, it encompasses more than the usual vertical arrangement of different uses, as may be found in an office building with stores on the ground floor, an apartment hotel having a garage in the basement, or a railway station on top of tracks. These typical building use arrangements include three characteristics that are lacking in most air rights development: single ownership, a functional kinship among the uses, and synchronized planning and construction.

Review of Experience

The expanding range of air rights projects is illustrated by a 1961 estimate that one hundred transactions in this field had been or were in the process of being negotiated in New York and Chicago alone.[3] Tables 1 and 2 list some of the existing and proposed developments throughout the country. As might be expected, most developments are over railroad tracks, with a smaller number over parking lots and expressways. But there are also examples of buildings resting on top of another.

As early as 1910, the Cleveland Athletic Club leased the air rights over a five-story commercial building and added another eight stories to house its activities. In 1922 another major air rights development was negotiated in Cleveland. The Cleveland Union Terminal Company, owned by three railroads, leased the air rights above a plane 32 feet over the track level. The improvements of this 35-acre tract of centrally located land now include the Cleveland Hotel, the Higbee Department Store, the Terminal Tower Office Building, and two other structures.

Although most air rights agreements involve air space over privately owned railroads conveyed to privately sponsored improvements, some projects include public as well as private property. In Cambridge, Massachusetts, the air rights over a publicly owned parking lot were sold for the construction of a privately owned motel. Santa Cruz, California, permitted a commercial development over a publicly owned parking lot. In New York, privately sponsored apartment buildings have been erected over the highway approaches to the George Washington Bridge. A proposal in the Bronx, New York, envisions private housing over a public school, and Toronto has considered public housing over parking lots. Publicly sponsored developments over privately owned land are not so common; one example is Brooklyn, New York, where the Board of Education considered the expansion of a municipal college over the tracks of a private railroad.

One of the largest and also most controversial air rights developments is on Chicago's lakefront. The 48-acre peninsula occupied by the Illinois Central Railroad yards has been called the most valuable undeveloped piece of real estate in any downtown area, with available air space valued at $100 million. The development started in the early 1950's with the construction of a 42-story office building by the Prudential Life Insurance Company. At present three developers hold options to the remaining air rights. One of these, the Interstate Development Corporation, is completing a 940-unit apartment building. However, complications have arisen which go beyond questions as to the proper use of the land and the obvious need for a coordinated development plan for the total area. The very ownership of the land, presumably vested in the Illinois Central Railroad, has been challenged by the City.

The most ambitious plan yet advanced for the utilization of air rights was a proposal submitted in 1961 to the State of New York by the Study Committee for Urban Middle-Income Housing. The Committee proposed the use of under-developed land for middle-income housing over selected, tax-exempt, public properties. Approximately 250,000 dwelling units in high-rise structures, housing approximately one million people, would be built under New York's limited-profit housing program. The plan identified more than 200 suitable sites over highways, public transit trackage, piers, schools, tunnel plazas, and parking fields.[4]

Table 1

Selected Air Rights Developments in the United States

Year	Location	Surface Use	Air Rights Development
1908	New York City	Railroad (New York Central)	Commercial and Residential (Park Avenue)
1910	Cleveland, Ohio	Commercial (Mercantile Bldg.)	Private Club (Cleveland Athletic Club)
1922	Cleveland, Ohio	Railroad (Cleveland Union Terminal Co.)	Commercial & Office
1927	Chicago, Ill.	Railroad	Office (Chicago Daily News Bldg.)
1929	Chicago, Ill.	Railroad (Chicago & North Western)	Commercial (Merchandise Mart)
1952	Chicago, Ill.	Railroad (Ill. Central)	Office (Prudential Bldg.)
1957	New York City	Highway (F.D.R. Drive)	Residential (Co-op Apts.)

1957	Providence, R.I.	Street	Parking
1959	Cambridge, Mass.	Parking	Commercial (motel)
1962	New York City	Highway (Approach to Geo. Washington Bridge)	Residential (Middle-income Apartments)
1962	New York City	Railroad (N.Y. Central)	Office (Pan-Am Bldg.)
1962	El Paso, Texas	Railroad (Southern Pacific)	Office (El Paso National Bank)
1962	Kew Gardens, L.I.	Railroad (Long Island)	Residential (Luxury Apts.)
1962	Sioux Falls, S.D.	River (Big Sioux River)	Parking
1963	Chicago, Ill.	Railroad (Chicago & North Western)	Residential & Commercial (Marina City)
1963	New York City	Railroad (Pennsylvania Station)	Commercial & Office (Madison Square Garden)
1963	Hollywood, Fla.	Parking	Residential
1964	Chicago, Ill.	Railroad (Illinois Central)	Residential (One Outer Drive East Apartments)

Table 2

Proposed Air Rights Developments in the United States

Location	Surface Use	Air Development
Akron, Ohio	Parking (Public Garage)	Commercial
Bronx, N.Y.	School (Board of Education)	Residential (Private)
Bronx, N.Y.	Railroad (Subway yard)	College (Board of Education)
Bronx, N.Y.	Highway (Hutchinson River Parkway)	School (Board of Education)
Brooklyn, N.Y.	Railroad	School (Board of Education)
Fresno, Calif.	Parking (Public Lot)	Commercial
Louisville, Ky.	Parking (Public Garages)	Residential & Commercial
Montreal, Quebec	Railroad (Public Subway Stations)	Commercial, Residential & Office
Philadelphia, Pa.	Railroad (Pennsylvania RR)	Residential (Luxury Apartments)
Rochester, N.Y.	River (Genesee River)	Commercial & Office
San Francisco Calif.	Railroad (Public Carbarn)	Commercial & Garage
Santa Cruz, Calif.	Parking (Public Lot)	Commercial & Office
Toronto, Ont.	Parking	Residential (low-rent apartments)

Incentives

The exploitation of air rights reflects the advantages inherent in such dual-purpose land development. Some have already been mentioned, such as the recapture of land lost to tracks and

pavement for other uses. There are also other advantages for such developments both to the municipality and to the private land owner and developer.

The benefits to the municipality are twofold. First, air rights over publicly owned facilities, such as streets, expressways and parking lots, may be sold or leased. Providence, Rhode Island, entered into a contract with a private parking firm to build an elevated parking deck over a city street. The City shares in the gross receipts of the operation, up to 52 per cent of all revenue over $150,000, and receives title to the deck after the expiration of the 25-year lease. Another example, the Santa Cruz, California, development, includes the sale of air rights for commercial development over city-owned parking lots. Secondly, land used for a public purpose is not permanently lost to the tax rolls. This is especially true for public rights-of-way that occupy an increasing share of the urban land surface, as well as rapid transit systems, public parking lots, and drainage channels.

Chicago expects its lakefront development to add $12 million to city property tax revenues. Massachusetts legislation provides that air rights improvements over publicly owned land must be taxed in the same manner and to the same extent as if the lessee were the owner of the land in fee, and the value of the land must be included in the assessment. The City of Hollywood, Florida, is leasing air rights over municipally owned parking lots and requires the lessee to pay all taxes levied against the land and against all improvements added by the lessee. A proposal for Louisville, Kentucky, recommends that the City condemn land and structures for construction of multi-level parking garages. The City would then lease the air rights to the space over the garages for private development — apartments, hotels, offices, stores.

Construction "in space" may be equally advantageous to the private land owner. The conveyance of air space over railroad rights-of-way has provided incremental income and explains the zeal with which railroads have promoted air rights deals: the New York Central in St. Louis, Indianapolis, Cleveland, and Columbus, Ohio; the Illinois Central in Chicago; and the Pennsylvania Railroad in New York, Newark and Philadelphia.

The incentives to acquire air rights are strong for the developer as well. Air space offers the opportunity to secure a large site in one transaction and eliminates the tedious process of assembling several parcels, demolishing existing structures and relocating present tenants. Secondly, it offers the chance to obtain a prime site in or near the central business district where reasonably priced conventional sites may no longer be available. Finally, air space is often sufficiently less expensive than similarly located vacant land to more than offset additional construction costs.

An added benefit to the community, perhaps less tangible, is the elimination of eyesores, such as open parking lots and railroad yards, and the closing of transportation cleavages — railroads and expressways — which tend to bisect communities. Neither railroads nor expressways add much to the aesthetic appeal of the urban landscape. A prime example again is the New York Central whose tracks entered the city surrounded by semi-slums; when covered by a platform, the right-of-way was transformed into one of the most admired pieces of real estate in the world.

Separation of Property Rights

The question of air space ownership has been settled in approximately half the stares by the enactment of legislation. The conveyance of air rights, however, has been authorized by the statutes of only three states. Thus, New Jersey[5] and Colorado[6] provide that:

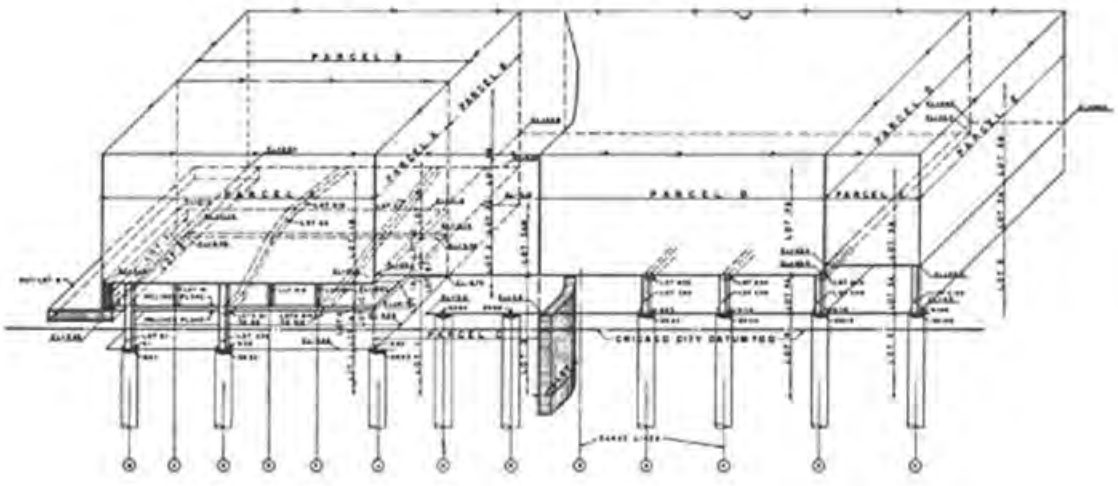
Estates, rights and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owner or owners of the land below such areas and shall be decreed to be estates, rights and interests in land.

Illinois permits municipalities to lease air space over streets and other public places for terms up to 99 years and permits railroads, which own the fee to real estate, to sell or lease the air rights for further development, provided such development does not interfere with the operations of the railroad.[7]

No other state has authorized the conveyance of air rights. Nor has the conveyance been specifically tested in court. Nevertheless, there is little doubt that the validity of such conveyances would be recognized if challenged. In many cases throughout the country, millions of dollars have been paid for leases or fee simple titles to air rights.

Since the property granted is a three-dimensional tract located above the land surface, the drafting of an air rights conveyance introduces a number of problems which are not generally presented by the conveyance of a surface parcel. The main difficulty is the requirement that, to be valid, a deed must describe the property granted in terms which are sufficiently precise to locate and distinguish it.

Figure 1



This three-dimensional illustration was taken from a portion of the recorded subdivision plat for the Prudential Building in Chicago. Clearance for the ground-level railroad is provided between supporting columns, beneath the "platform" on which the building is constructed.

The legal documents used in recording a sale or lease include a plat of subdivision covering the specific property involved. The property is subdivided vertically* in the conventional manner and a system of fixed range lines is delineated upon the plat. Horizontally, it is subdivided by a system of fixed planes, related by specific elevations to city datum or some other known recorded basic level. Similarly, the center lines of column and caisson lots are located specifically by reference to fixed range lines delineated upon the plat of subdivision with the upper and lower limits of such lots fixed by reference to planes of specific elevations. The exact boundaries of the various parcels are, therefore, easily determined.

*Vertical subdivision refers to the subdivision of property along a vertical plane; horizontal subdivision refers to the subdivision of property along a horizontal plane.

Four different methods of conveying air rights have been employed, one of which involves a leasehold and three of which involve granting the developer a fee interest in the air space (for examples, see Table 3):

1. The leasing, with options to renew, of air space and land necessary for foundations by the owner to the developer. The lease should include provisions with regard to insurance, tax apportionment, transfer rights of the developer, and the respective rights and responsibilities of the parties, during the period of the lease as well as after its expiration.
2. The conveyance of the entire fee of land and air space to the developer with an easement reserved to continue the surface use. From the purchaser's point of view, this is an ideal arrangement, not only because of its flexibility, but because the entire property is owned outright. The surface use has, legally at least, a subordinate or inferior interest.
3. The conveyance of the fee to the air space above a certain level and the grant of easements through the ground fee for supporting foundations. This method, as well as the following, results in two adjoining fee titles, but in a horizontal rather than a vertical relationship.
4. The conveyance of the fee to the air space and support areas. This method was pioneered in Chicago in connection with the Merchandise Mart and was based on the premise that land could be platted and subdivided not only vertically but horizontally. Both the air and land comprising the site of the Merchandise Mart were subdivided into various lots. The developer took title, for example, to certain caisson lots necessary to furnish the foundations on which the building was to rest.

Table 3

Methods of Conveyance of Ownership Rights in Selected Air Rights Developments

Method	Project	Description
1. Lease of air rights	Park Avenue, New York	Railroad leased air rights to developers; when leases expired, it demanded replacement of original structures with office buildings which have a higher income potential.
	Cleveland Athletic	98-year lease of air rights, lobby and basement

	Club	space, elevators, stairway, etc.
	Cleveland Union Terminal Development	Lease including easements for caissons and columns.
	Providence, R.I., parking deck over public street	25-year lease; after expiration, deck becomes city property.
	Hollywood, Fla., apartments over parking lots.	59-year lease.
2. Sale of entire fee rights to land and air space	Kew Gardens, L.I., apartments	Long Island Railroad sold a part of its right-of-way and retained an easement for its tracks.
	Marina City, Chicago	Chicago & North Western Railroad sold a part of its right-of-way and retained an easement for its tracks.
3. Sale of air rights and caisson lots	Merchandise Mart, Chicago	Developer bought air rights plus fee rights in caisson-column lots.
	Prudential Building, Chicago	Developer bought air rights plus fee rights in caisson-column lots.
4. Sale of air rights with grant of easement for foundations	Bridge Apartments, New York	City sold air rights at public auction subject to the requirement that the property be used for middle-income housing.

Legal limitations as well as financial considerations influence decisions as to which method of conveyance should be used. Far example, if the trustee under a railroad mortgage lacks legal authority to convey, then a lease is the only method available. The prospective mortgagee of the air rights improvement, on the other hand, would naturally prefer a sale. Otherwise, the mortgage security would in effect comprise a leasehold estate.

At times, the conveyance of the entire fee of land and air space is necessary to satisfy the mortgage lender. When the Long Island Railroad embarked on its real estate marketing program for the construction of residential buildings in Kew Gardens, Long Island, it found that the developer was unable to secure mortgage commitments on the proposed residential projects to be built on air rights. The railroad had no choice but to sell a section of its right-of-way, retaining a perpetual easement for its tracks.

Office building developers will usually find mortgage funds more easily available, as even speculative builders generally obtain from tenants long-term leases that then serve as mortgage security.

Value of Air Rights

The marketing of air rights requires a determination of their value. This involves both an appraisal for sale or lease and an assessment for tax purposes. As air rights comprise only a portion of the total rights of the land, the value of the complete fee rights must be determined

before the value of this portion can be determined. As the key to the value of air rights — utility — is the same as the key to the value of any parcel of real property, a comparison approach is used. The building to be erected in air space is compared with a similar, hypothetical building erected upon the land underlying the air rights. One authority suggests that this comparison includes:[8]

1. A study of the relative cost of construction of the two buildings.
2. A comparison of the cost of maintenance and operation.
3. A study of the respective earning capacities.

Major added costs in building air rights structures include columns, beams and girders to support the elevated structure; the installation of a structural bottom floor slab; and higher sewage plumbing costs. Furthermore, the absence of basement space in an air rights structure results in a loss of income due to the location in otherwise rentable space of utilities normally placed in the basement.

These higher costs were recognized in the leases offered by the New York Central Railroad in the Park Avenue and Grand Central Terminal developments. The railroad offered the air right leases at annual rentals equal to five per cent of the fair value of the complete fee rights in the land involved, whereas, at the time, the going rate of return on such land was six per cent. It was therefore unnecessary to determine the fair value of the air rights as such. The original leases further stipulated that the railroad and lessee would share equally the general real estate taxes levied against the surface land. When, at a later date, some of the air rights were sold outright, the tax assessor divided the assessed value of the land in the ratio of eighty per cent to the air rights portion and twenty per cent to the subviaduct portion. This division has proven equitable in other central business district locations where high-rise structures have been built.

In the Kew Garden development, the Long Island Railroad sold its right-of-way for approximately one dollar per square foot in an area where vacant land — if available — would have cost ten to twelve dollars per square foot. Construction costs attributable to abnormal foundation work raised the cost of land acquisition to approximately seven dollars per square foot.

Air rights totaling 130,000 square feet over the approaches to the George Washington bridge in New York were bought by the Washbridge Housing Corporation at a public auction for $1,100,000 or approximately $8.50 per square foot. Supplementary foundations added $1,529,000 to normal construction costs.

In Cambridge, Massachusetts, the air rights over a municipal parking lot were sold to a motel developer for $1.75 per square foot, 50 cents more than the minimum authorized by the city council. During construction, the developer was required to reimburse the city at the rate of $600 per month for losses in revenues from parking operations.

The dual handicaps of inflated construction costs and reduced income potential obviously limit the number of sites suitable for air rights developments. The desirable areas are those where land values exceed the cost of building a platform or some other supporting device. Additional construction costs in Chicago have in the past ranged from four to twenty dollars per square foot

and may exceed the latter figure now. The construction cost of the Pan American building is estimated to have increased from five to ten per cent due to its position above Grand Central Terminal. It is evident, therefore, that location is of considerable importance to real estate developers. Few of the many miles of tracks and expressways crisscrossing a city provide an economically feasible project for second-level development — at least not at present land prices or through the operation of the private real estate market.

Planning Considerations

From a planning viewpoint, probably the most serious problem is that construction in air space opens up tracts for a type of development that most likely was not anticipated in the land use plan. At the time most land use plans were prepared, it was unusual for consideration to be given to the possibility of air rights improvements over tracks and expressways.

In a sense, an area that acquires potential for air rights development increases the supply of buildable land. It may add to the existing building density and bulk and to increased demand on existing public facilities and utilities. Air rights improvements would fill existing open space and possibly cut off light and air from surrounding structures. Although tracks, parking lots and expressways may contribute little to the visual appeal of urban centers, their existence has provided open areas in downtown districts.

A differential rate of obsolescence between surface and air development is another potential source of conflict, especially if the ground use has a shorter life expectancy or has early expansion needs. Where apartments are built over schools, it may be difficult to expand the school facilities or, if abandoned, the space used for classrooms may be unsuitable for other purposes. Similarly, it may be difficult to expand or relocate the right-of-way of an expressway once it has been covered. Space now occupied by railroad tracks and yards cannot be easily altered for modernization or converted to other usage.

Problems of compatibility between contemplated improvements and existing service uses should be carefully investigated. Some uses may be complementary, e.g., commercial establishments built over parking lots. Others may interfere with each other unless effectively separated by a platform completely covering the ground use. Railroads and expressways fall into this category where noise, dirt and fumes will affect the straddling improvements; conversely, access ramps from overhead residential or commercial uses to a major highway can disrupt traffic flow.

A basic question to be answered by public officials is whether it is in the public interest to develop potential air rights areas for private use. A further question asks whether there should be any distinction between air rights development and other uses for the purposes of land use controls and regulations.

The preparation and adoption of a plan for air space use is essential for two reasons: first, to determine potential air rights development areas and specify those where such development would be in the public interest; and second, to suggest the kind of air rights improvements, public or private, that would conform to the over-all plan, both surface and air, in the area.

Whatever regulatory measures controlling air rights may be adopted, it must be remembered that such regulations will apply primarily to privately owned areas. There will be a question in some states whether such regulations can apply to publicly owned property, such as an expressway operated by a state tollway commission. For example, in 1962 the Massachusetts Turnpike Authority introduced a bill in the state legislature that would grant the authority *carte blanche* powers to lease air rights for private construction over the Boston Turnpike extension. City building, fire, zoning, and health regulations would not apply under the provisions of the proposed bill. The chairman of the Turnpike Authority asked for passage of the bill by insisting that immediate decisions were essential to permit simultaneous construction of the expressway and air rights development. The proposed bill, moreover, would have subjected an air rights development to taxation of the value of structures only, and not on the value of land. The city insisted that municipal approval be required to assure conformance with local regulations as well as with over-all city plans. It also argued that payment in lieu of taxes should be collected on the value of the land from the Turnpike Authority. The bill was approved by the state legislature, but vetoed by the Governor.

The sale or leasing of air rights over city-owned property is, of course, subject to all and any conditions the city may wish to establish. For example, Montreal intends to sell or lease air rights over 21 subway stations currently under construction. The city planning department has been assigned the responsibility of determining desirable occupancy and construction standards. After completion of the site plan, advertisements will be published by the city calling for development of the site in accordance with such conditions. Bids will be studied by a committee consisting of representatives of the departments of public works, planning, law and finance.

Solution of the problem of assuring conformity to a general plan may call for two approaches. First, the city itself can purchase the rights and build portions of the development, such as the platform. The city would then resell or lease parcels for private development in accordance with the plan. This approach is the simplest, aside from financial questions, and could be used for large-scale development over private property, as well as for construction over land that the city already owns.

The second approach is to adopt regulations under which approval for private owners to build is conditioned on conformance to the plan. This is difficult if a large parcel is to be developed in stages and construction involves several developers.

Public Ownership and Resale or Lease

There may be several methods of purchase, building and resale of air rights parcels. Acquisition of the whole land parcel and construction of the platform could be a part of a program to construct a public facility, the cost of which would be financed by revenue bonds. For example, an off-street parking garage, assuming the project is financially feasible, might be constructed and the revenues pledged to payment of the bonds. The revenues might come from the lease of space over the parking lot for private air rights construction as well as from the lease of the parking lot itself. It may be possible for the city to lease the parking facilities before construction, with an obligation on the lessee to do all the construction, including streets, with the city sharing in the street costs.

In some states, cities may have the authorization to condemn and sell the land in such a way that the purchaser contracts to clear existing structures and build the super-structures. For example, if the air rights area could qualify as a blighted area for redevelopment, on the basis of obsolete platting and a need for new residences, commercial structures, and other private facilities, the project might be carried out under the redevelopment authority of the municipality. The municipality's contribution would be its power of eminent domain. Future federal urban renewal policies will probably be a significant factor in considering this approach, although many municipalities could initiate non-federally assisted projects under existing state legislation.

Figure 2.

Four 32-story apartment buildings and a modernistic bus station (above and to the left of the apartments) have been constructed on air rights above the George Washington Bridge approach in New York City. The bridge (upper left) crosses the Hudson River, linking Manhattan Island with New Jersey. In the foreground are the approach to the bridge (lower right) linking

Manhattan and the Bronx, and the interchange of Interstate 95 and Hudson River Drive. (Photo: Port of New York Authority.)

Regulatory Controls

The second approach — approval to build conditioned on conformance with a plan — does contain weaknesses, especially where the proposed air rights project is large enough to require participation by several different developers. Nevertheless, once a plan has been developed for the area and approved by corporate authorities, it is probably possible to grant the planning commission authority to withhold approval unless there is conformance with the plan. The city could adapt for air space development and use existing legislative authority for regulations under subdivision control, zoning, mapped streets, mandatory referral and capital improvement programming.

An important method of control for the municipality is through adoption of appropriate zoning regulations. The reasonableness of zoning controls to secure compliance with the plan should be based on an officially adopted plan for the area.

The few existing zoning ordinances that make special reference to air rights developments suggest that the intent of these provisions is the same — the establishment of site plan review procedures. There are at least two zoning concepts involved in the problem of air rights control.

The first concept that might be applied is the use of an "overlay zone." An overlay zone would superimpose upon an existing basic use district certain permissive uses and regulatory standards applicable to such uses, without changing the application of the basic underlying district regulations. It represents, in effect, the predetermination of certain areas for specified conditional uses. In mapping an overlay zone for air rights development, there would be no necessary geographical coincidence between the underlying zone and the overlay. In other words, the overlay might include only portions of one or more underlying zones. The additional uses permitted and the standards applicable to such conditional uses are spelled out in the ordinance.

The second technique to provide detailed site review procedures is through adoption of planned unit development provisions in the zoning ordinance. There are a variety of planned development provisions in zoning ordinances across the country. Some cities, for example, require rezoning for every planned unit development. This procedure is in effect a special district that appears in the zoning map as a planned development district. Other provisions utilize certain features of overlay districts. Still others give a great deal of discretion on location, type of development, and use to the designated reviewing authority.

Planned unit development provisions are also intended to allow a great deal of flexibility in design. There is, nevertheless, a need for limitations. Planned unit development provisions should require maximum ground coverage and floor-area requirements that are at least as restrictive as those applied to other properties in the same zone. The permitted population density, if the construction is to be for residential purposes, should be tied to the density requirements of other property in the same zone.

New York and Chicago have incorporated extensive provisions within their zoning ordinances for control of air rights development.

The Zoning Resolution of the City of New York, as amended September 1962, defines railroad or transit air space as "space directly over a railroad or transit right-of-way or yard, which right-of-way [is] open, except for structures accommodating activities incidental to its use as a right-of-way or yard, and not otherwise covered over by any building or other structure at the effective date of this amendment."[9]

The Resolution states that the City Planning Commission may permit developments or enlargements in railroad or transit air space for any use permitted by the applicable district regulations, provided that the following findings are made:

(a) That the lot area for such development or enlargement includes only that portion of the right-of-way or yard which is to be completely covered over by a permanent fireproof platform, unperforated except for such suitably protected openings as may be required for ventilation, drainage, or other necessary purposes.

(b) That adequate access to one or more streets is provided.

(c) That, considering the size of the proposed development or enlargement, the streets providing access to such use will be adequate to handle increased traffic resulting therefrom.

(d) That, from the standpoint of effects upon the character of surrounding areas, the floor area or number of rooms is not unduly concentrated in any portion of such development or enlargement, including any portion located beyond the boundaries of such railroad or transit air space.

In addition, the City Planning Commission "may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area, and may require that the structural design of such development or enlargement make due allowance for changes in the layout of tracks or other structures within such right-of-way or yard, which may be deemed necessary in connection with future improvements of the transportation system."

Thus, air rights developments over railroad yards are permitted by essentially administrative decisions of the Planning Commission, leaving the Commission a certain range of discretion. Approval by the Board of Estimate, the City's governing body, is not required.

The Chicago Zoning Ordinance, as revised to May 1963, defines air rights as follows:

Air rights for the purpose hereof shall be defined to mean the ownership or control of all land, property, and that area of space at and above a horizontal plane over the ground surface of land utilized for railroad or expressway purposes. The horizontal plane shall be at a height above city datum which is reasonably necessary or legally required for the full and free use of the ground surface.[10]

All air rights developments must be submitted and processed under the planned development provisions of the zoning ordinance. A tract of land, designated as a planned development, may be permitted in any zoning district and is given a special district designation on the official zoning map: "Residential Planned Development No. __ ," "Business Planned Development No. __ ," or "Manufacturing Planned Development No. __ ." All former district boundaries are superseded and eliminated.

The zoning ordinance makes a distinction between air rights developments and other types of developments that might qualify as a planned development:

The Zoning Ordinance provides that a Planned Unit Development must qualify as a tract of land which is developed as a unit under single ownership or control, or which is under single designated control by a common ownership at the time it is certified as a "Planned Development." It must include two or more principal buildings, except in the case of hospital planned developments or air rights planned developments which may have only one principal building. A Planned Development shall be at least four acres in area, except for planned developments operated by a municipal corporation, or a hospital as defined by law, which shall be at least two acres in area. Manufacturing planned developments shall be at least ten acres in area. Air rights planned developments shall not require any minimum area.[11]

The application for such an amendment is referred to the Zoning Administrator and to the Department of City Planning for review and recommendation, based on the following criteria:

1. That the plan of the area proposed for the Planned Development be in conformity with a comprehensive plan of adjoining areas having similar characteristics, and shall be in accord with current city plans approved by the Chicago Plan Commission;
2. That the use or uses proposed be compatible with abutting land uses;
3. That the intensity of use — Floor Area Ratio and Density Pattern — be in conformity with current city planning requirements and with that of surrounding land use and zoning, and be so distributed as to avoid undue concentration in any one portion of the subject area;
4. That buildings be spaced in a manner which would conform with the yard and setback provisions in the Zoning Ordinance;
5. That parking and loading facilities be provided to meet the intent of the Ordinance;
6. That ingress and egress be provided to afford ample access for Fire Department and other emergency vehicles, deliveries, etc., and that entrances and exits be located in such a manner so as to facilitate the efficient circulation of both pedestrians and vehicles, and not conflict with the traffic pattern of the vicinity; [and]
7. That all other intents and purposes of the Zoning Ordinance be met.[12]

The Commissioner of City Planning submits a separate report and recommendation to the City Council Committee on Building and Zoning which, after a public hearing, refers the application to the City Council for final action.

While a separate problem than that with which this report is concerned, the purchase of air space above existing buildings to meet building bulk standards raises some interesting planning and

zoning questions. In San Francisco, calculation of the lot base for the floor-area-ratio method of controlling building need not be limited to the particular lot on which the building rests. It can be expanded by acquisition of air rights, or perpetual easements to light and air, over lower neighboring structures. In effect, the sale of air rights means that the owner of a building gives up, for a consideration, his right to build as high as he wants, and this becomes a deed restriction to be conveyed to his "heirs and assigns." The Equitable Building was built under this special permit procedure. The application for the proposed American President Lines Building, which paid the city $100,000 for air rights over a garage to enable the new building to be cantilevered over the garage structure, was also processed under this procedure.

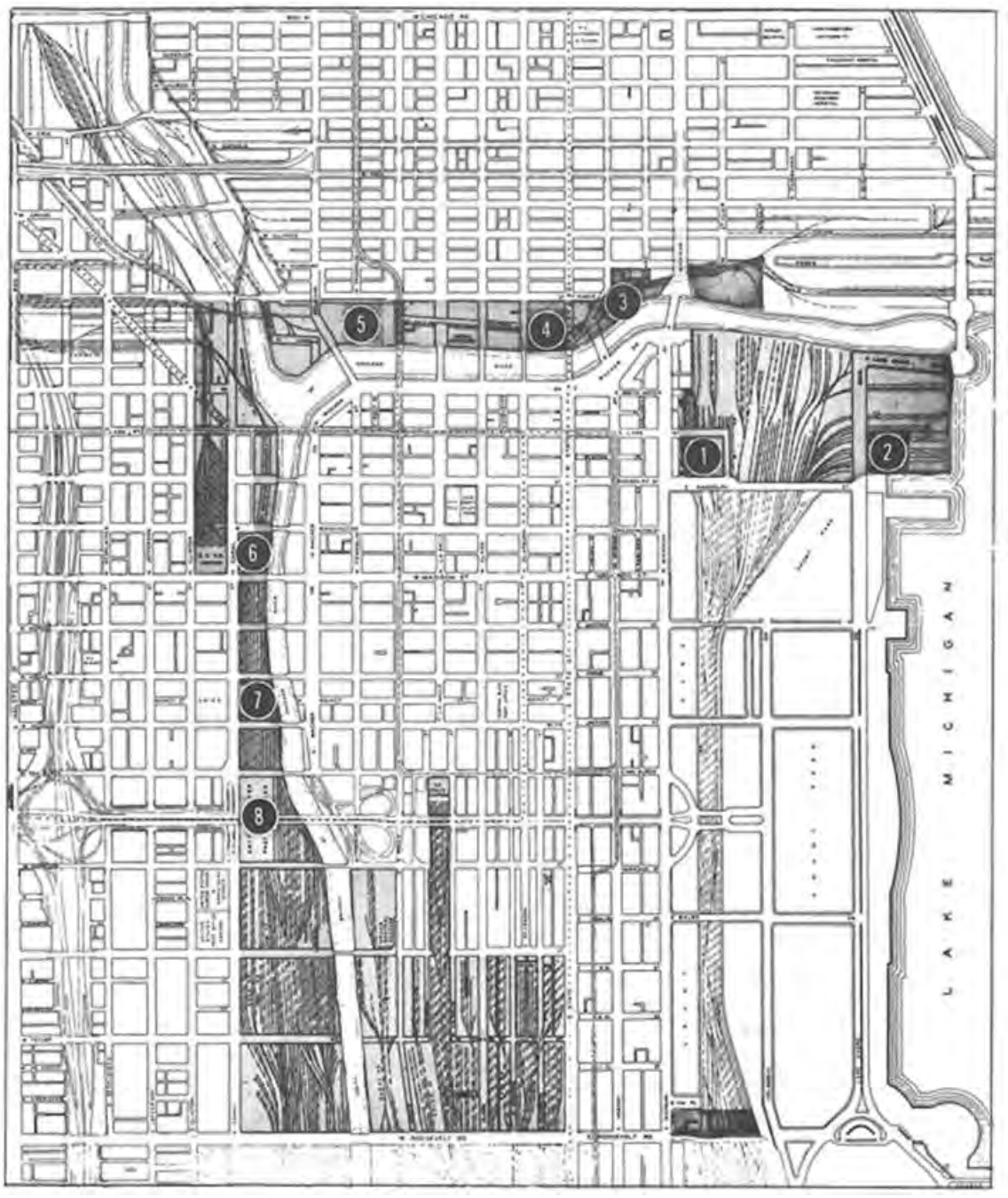
If a workable system can be devised to permit transfer of permitted floor area, it would allow greater diversity of development. The lack of experience in using this transfer technique, however, makes it difficult to predict its effectiveness. Certainly, transfers should be limited to small areas — perhaps adjacent property not separated by a street or property in the same block. If the system caught on, the municipality might well end up mapping areas within which floor area ratios could be transferred.

Pressures for transfer of floor area ratios are intense in the central business district or in nearby zones permitting high-rise buildings. The owner of a low-rise building is under great economic pressure to make way for higher density development. Permission to transfer his additional density rights to nearby property might encourage the desired diversity of development.

The problem is to devise some arrangement that can be administered and be legally effective over many years. Deed restrictions may not provide the desired permanence both because of legal technicalities and because, in many states, the restrictions expire in a relatively short time. Some other device resembling the conditions attached to a variance may be necessary so that municipalities can impose and enforce individualized restrictions on each lot. The sale of "floor area units" by one owner to another may hold some promise. Units within a prescribed area would presumably come to have a market value, just as the land itself does.

There is one further problem — an owner transferring his floor area units might be able to get them back through a variance or exceptions. In this case, if public officials were overly lenient, building bulk standards would be sabotaged.

Figure 3



Buildable land ringing the Chicago "Loop" (shown as shaded areas). The ring would be virtually complete were it not for the fact the Illinois Central Railroad tracks in Grant Park (right) are subject to a general covenant not to build relating to the Park contained in the original plats of subdivision for Chicago.

Some of the development that has already taken place involving "air rights" is indicated:

(1) The Prudential Building
(2) Outer Drive East Apartments (Jupiter Corporation)

(3) Chicago Sun-Times Building
(4) Marina City
(5) Chicago Merchandise Mart
(6) The Old Chicago Daily News Building
(7) Chicago Union Station
(8) Chicago Main Post Office

In some cases, buildings have been constructed that have simply avoided the railroad tracks (as the Central Office Building, between (4) and (5)).

In the open areas between (6), (7), and (8), the proposed "Gateway Center", an integrated office and transportation complex, is being undertaken. Wolf Point, left of the Merchandise Mart (5) is also contemplated for development.

Source: *Airspace in Urban Development*, Technical Bulletin No. 46, Urban Land Institute (Washington, D.C., 1963), p. 19.

The Future

There appears to be a number of new directions that might be proposed by enterprising developers in the next few years. The question has been asked why government buildings should require separate space, on a prime site and off the tax rolls, when they might be located within air space over expressways. And why cannot space under elevated expressways be utilized for public buildings or sold or leased for commercial activities to help defray the cost of these expensive improvements? A Louisville newspaperman advocated the "return of key portions of urban expressways to the private enterprise system,"[13] and estimated that some locations would be so valuable for real estate development that a developer could afford to build the expressway portion at no cost to the public.

Recognizing that expressway space could be used for purposes other than traffic, the Federal Aid Highway Act of 1961 made provision for the leasing of air rights over interstate highways. Special regulations, aimed at preventing any interference with the use and safety of highways, were published by the Bureau of Public Roads in 1962.[14] The regulations list restrictions on supporting columns, clearance, ventilation, access from building to highway, etc., and state that no federal funds can be used for such construction nor for cost added to highway construction because of such construction. The Bureau reserves final approval, although the States are given authority to use or permit use of air space.

A redevelopment plan prepared for Rochester, New York, recommends a narrowing of a central section of the Genesee River and the construction over part of the river bed of a hotel, apartments and offices. In Sioux Falls, South Dakota, a recently completed two-deck municipally owned parking garage spans the Big Sioux River in the central business district. The construction cost of $2,070 per space, which exceeds the national average for off-street parking spaces by only $70, was more than offset by lower land costs.

A similar proposal is contained in the plan for Aurora, Illinois, which recommends that the east channel of the Fox River be blocked and its waters diverted to the west channel. Under the concept of riparian rights, the dry river bed would revert equally to its adjacent property owners. The plan suggests that the land be earmarked for parking or a related use. As the City will own two of the river bed sites outright, public parking lots are proposed at these points. The remaining site could be developed under cooperative private sponsorship.

One of the most challenging proposals is the use of urban renewal legislation and funds for the development of air rights sites, especially over railroad tracks. One such proposal is currently being studied by the Housing and Redevelopment Board of New York City and contemplates the designation of the New York Central Railroad yard between 60th and 70th Streets — "Litho City" — as an area appropriate for urban renewal. The urban renewal project would be limited to the air rights over the present freight yard and would involve a housing project sponsored by the Amalgamated Lithographers of America. Designation as an urban renewal project would be necessary to make the area eligible for federal insurance of mortgage financing under Section 220 of the National Housing Act.

The City Planning Commission, in reviewing the project, found that the area is substandard "by reason of its present incompatible land use and the existence of nuisance conditions such as noise and unsightly railroad yards which create an adverse influence on adjacent properties, impairing their economic soundness and stability, thereby threatening the source of public revenue and impeding the advancement of a general renewal program in the surrounding neighborhood."[15] The Commission noted that the area was zoned as a manufacturing district in which residential development was not permissible and that a zoning modification was therefore necessary. It recommended that the lowest level should be reserved for railroad yard use and the upper levels be developed for residential uses including necessary community facilities.

While this proposal does not envision the use of federal funds, a report prepared in 1963 by the Governor's Committee to Accelerate Middle-Income Housing and Urban Renewal Construction Activity in New York City recommended:

That consideration be given by the Congress of the United States of expanding Title I of the National Housing Act to recognize the creation of air-rights sites as a bona fide urban renewal project activity with the costs of the slab and abnormal foundations being eligible as Federal, State and local urban renewal costs.[16]

An amendment of the Housing Act to this effect and the use of public funds to defray some of the costs incidental to air rights construction would, of course, open up new areas for economically sound development. Furthermore, the prospect of building large-scale, low- or moderate-income housing projects in an area free of troublesome clearance and relocation problems would appeal to many public officials.

As presently practiced, air rights developments are expensive and therefore, by their very nature, limited to a few sites. Most of the past experience and most new ideas have originated in New York, because of the special characteristics of the New York environment. Few other cities

would tolerate the high densities of Manhattan nor are their land values high enough to absorb additional construction costs, except, perhaps, in central business district locations.

There is little reason to believe that the extent, scope and variety of air rights developments have been exhausted. On the contrary, imaginative proposals are competing for public attention, and although the record of achievement is still limited to certain choice sites, it seems likely that the future will witness an expansion in the use of air space.

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13. Grady Clay, real estate editor for the *Courier-Journal*, as quoted in the *Louisville Courier-Journal*, November 20, 1962.

14. U. S. Department of Commerce, Bureau of Public Roads, Instructional Memorandum 21-3-62, dated May 4, 1962, *Use of Airspace on the Interstate System*.

15. City of New York, City Planning Commission, Ca1. No. 58, October 17, 1962.

16. State of New York, Governor's Committee to Accelerate Middle-Income Housing and Urban Renewal Construction Activity in New York City, *Report*, 1963.

Exhibit 6

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Airspace Conveyance Policy Changes

New York City's new requirement has widespread implications.

BY MARC A. LANDIS AND LONICA L. SMITH

IN RECENT YEARS, New York City real estate owners have capitalized on their investments by selling or leasing every conceivable part of their property, from wall surfaces for advertising space to rooftop surfaces for cell towers. Increasingly, these owners are considering the sale of airspace.

There are several reasons an owner may want to convey airspace separately from the underlying land. Parcels consisting of an airspace envelope have been transferred to enable the purchasing party to obtain tax exemptions available only to owners,[1] to avoid legal restrictions on use pertaining to the current owners, or as an alternative method of carving up a single parcel of real property among separate owners without resorting to the condominium form of ownership.[2]

> Virtually **every New York City transaction** involving the transfer of development rights now requires the creation of a legally defined **airspace parcel**, the utilization of an **'airspace deed'** to convey the parcel, and the subdivision of the underlying lot to create a new **tax lot for the airspace** on the city's tax map.

In 2008, the New York City Department of Finance (DOF) adopted a new policy regarding airspace conveyances and other transfers of air rights. Effective Sept. 1, 2008, the DOF declared that no "Air Rights document(s)" may be filed with the Office of the City Register (now known as the Division of Land Services), without first having an "Air Rights lot…issued, finalized and approved by the [NYC] Surveyor").[3] Under this policy, documents involving air rights are no longer accepted for recording against partial lots.[4]

As a result of this policy change, virtually every New York City transaction involving the transfer of development rights now requires the creation of a legally defined airspace parcel, the utilization of an "airspace deed" to convey the parcel, and the subdivision of the underlying lot to create a new tax lot for the airspace on the city's tax map. The implications of this policy change are widespread.

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Defining the Terms

The DOF's change in policy raises the question of what is meant by "Air Rights documents." "Air rights" refer to the entire bundle of rights of an owner of real property to use, control and enjoy the airspace above his land. While FAA regulations and various statutes have limited an owner's air rights somewhat, at common law a real property owner was considered to own the airspace above his land to an indeterminate extent and to enjoy all the rights of real property ownership with respect to such airspace.

"Development rights," which are the rights in which many owners and developers in New York City are most interested, are only one part of this bundle of air rights; they refer to the right of the owner to build upon or otherwise develop his land. An even smaller subset of these rights includes transferable development rights, often referred to as "TDRs."

TDRs are a creation of municipal or other local law. As increasingly complicated zoning restrictions have limited the encroachment of buildings into the air, the city of New York has developed several different mechanisms allowing property owners to transfer their rights to build larger buildings to owners of neighboring, and sometimes distant, properties.

The policies behind the allowance of such transfers vary, from providing a measure of compensation for what otherwise may be considered a government taking, to encouraging development of affordable housing and raising

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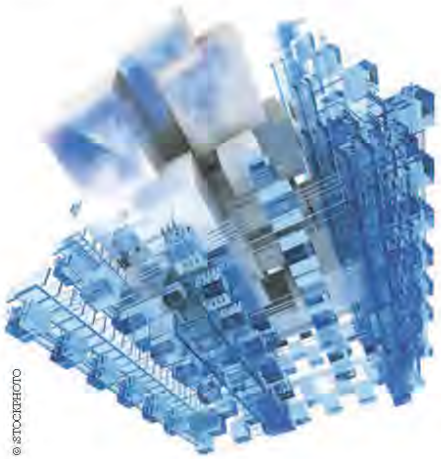

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funds for public works projects, such as school construction. Real estate developers often seek to purchase TDRs as a means of increasing the allowable floor area ratio (FAR) of their projects. The vast majority of "air rights" transactions in New York City are TDR transactions.

Old Deal Structure, Documentation

Prior to the DOF policy change, a typical transaction involving TDRs in New York City required only the creation of a zoning lot merger in accordance with the provisions of §12-10 of the New York City Zoning Resolution (ZR).[5] Pursuant to the ZR and requirements of the New York City Department of Buildings (DOB), a zoning lot merger requires only four documents:[6]

- a Certificate of Parties in Interest issued by a title company licensed to do business in the state of New York, setting forth all parties having an interest (as defined in the ZR) in the properties from which (the "sending parcel(s)") and to which (the "receiving parcel(s)") the rights were to be transferred;
- a Declaration of Zoning Lot Restrictions between the purchaser and seller of the development rights (and any other interested parties wishing to join in the declaration);
- a Waiver of Declaration of Zoning Lot Restrictions by any parties in interest not joining in the declaration (usually including a subordination clause for any mortgages, leases or other interests that may encumber the develop rights); and
- a Zoning Lot Description and Ownership Statement describing the properties to be merged, the proposed new zoning lot, and the ownership of the parcels involved in the merger.

The parties to a transaction involving TDRs also typically executed a contract of sale describing the financial and other terms of the deal, and/or a zoning lot development agreement (ZLDA) describing the obligations of the parties and addressing issues such as future development and property use, construction, and real property taxation. Where the sending and receiving parcels were in close proximity to one another, an easement for light and air in favor of the receiving parcel was often included to ensure that future development on the receiving parcel could comply with building code requirements.[7]

Although some TDR transactions did include a conveyance of airspace by deed, this was not typical. Prior to the DOF's change in policy, many TDR deals were structured to transfer only the excess development rights of the sending parcel.

The development rights to be conveyed were often described only in general terms of excess allowable FAR,[8] or unused development rights, available to the sending parcel, and in many cases, did not even include a calculation of the exact amount or square footage of floor area available to be transferred.

> The creation of separate tax lots specifically for airspace parcels would seem to **open the door** for **possible taxation**; as it now stands, they are included on the city's tax rolls and assessed on a **'value reflected basis,'** meaning these parcels are considered to have value, but that value is **reflected into other tax lots**.

While legal descriptions of the sending parcel, the receiving parcel, and the new zoning lot were included in the required documents, the deal could be completed without including a legal description in three-dimensional space.

New Considerations

Now, parties may no longer be able to avoid upfront costs by simply agreeing to transfer whatever development rights happen to be available. Experts such as architects, surveyors and engineers are needed to study and precisely describe the rights to be transferred, by deed or otherwise, before a contract of sale is entered. An airspace survey, at the very least, is necessary to the creation of a sufficient legal description, and title to the airspace parcel must be examined and cleared before the transaction is closed.

There are timing considerations as well, if the creation and subdivision of an airspace parcel are to be completed in addition to the zoning lot merger process. Obtaining a tax lot subdivision from the DOF can be a lengthy and time-consuming process. Air rights purchasers with construction deadlines would do well to begin the subdivision process as soon as possible after entering a contract of sale for TDRs, and the parties should allow sufficient time between contract and closing for the tax lot subdivision to be completed, since the airspace deed and other documents cannot be recorded without the tax lot subdivision.

A full fee transfer of airspace, as opposed to a transfer of TDRs only, could result in unexpected difficulties for the owner of the sending parcel, since the new owner of the airspace parcel would have acquired a variety of property rights enforceable against the owner below.

For instance, in *Wing Ming Properties v. Mott Operating Corp.*, the defendants had conveyed all of their airspace to the plaintiff's predecessor in interest, reserving for themselves only the space occupied by an existing room built upon the roof of their building and several rooftop air conditioners.[9] Subsequently, the defendants' tenant removed the rooftop room and the existing air conditioning units and installed new air conditioners and a parapet wall that occupied slightly more space than the prior air conditioning units and room. The owner of the airspace parcel sued the owner of the lower parcel for trespass.

While the Court ultimately found in favor of the defendants, largely because the encroachment into the airspace parcel was de minimus, parties to airspace deals should be careful to structure them to avoid this issue. The creation of an easement in favor of the sending parcel may help to resolve it, if the easement is drafted to include all possible non-FAR structures and uses the owner of the sending parcel (and its successors) may desire to implement on the sending parcel in the future.

Another consideration for parties contemplating a fee transfer of airspace in connection with a TDR transaction is the unsettled nature of the law on the legal status of airspace parcels. There appears to be no question that, when connected to the underlying land and considered together

with it, airspace is real property.[10] Yet airspace is not included in the definitions of real property contained in the New York Real Property Law and the New York Real Property Actions and Proceedings Law (RPAPL),[11] and it has been argued that this lack of inclusion was intentional, and that airspace, once separated from the underlying land, is no longer considered to be real property for purposes of those statutes.[12]

The status of airspace as real property could have practical implications for owners of subdivided airspace parcels and other interested parties seeking to enforce their rights in or against the subdivided airspace parcel in the future.

Taxation of Airspace Parcels

Both TDRs and airspace are considered to be real property for purposes of New York City and New York state real property transfer taxes.[13] While the New York State Office of Real Property Services has maintained that air rights and TDRs are not considered to be real property for purposes of the real property tax, the issue of real estate taxation of airspace parcels is not fully settled.[14]

The creation of separate tax lots specifically for airspace parcels on the city's tax map would seem to open the door for possible real estate taxation of these parcels in the future. As it now stands, these parcels are included on the city's tax rolls and the New York City Assessors Office assesses them for tax purposes on a "value reflected basis." This means that the parcels are considered to have value, but that value is reflected into other tax lots.

While presumably the value would be reflected into the receiving lot, a downward adjustment to value is typically not made to a sending lot following an airspace conveyance. Likewise, an upward adjustment to value is typically not made to the receiving lot, unless a larger building is actually built on the receiving lot utilizing the transferred development rights.[15]

As a practical matter, real estate taxation of airspace parcels may be a long way off, since separate ad valorem taxation of these airspace lots could prove problematic from a valuation standpoint.[16] However, it is not outside the realm of possibility. Given that such parcels clearly have value, if the amounts paid in TDR deals are any evidence, a cash-strapped municipality seeking additional means of revenue may resort to such a tax.

Title Insurance Matters

One benefit to the use of an airspace deed in a TDR deal is that title to the TDRs is more easily insurable.

Without a deed or easement, the only title insurance option available for such a deals is a "development rights endorsement," which generally insures only that all of the parties in interest have executed the Certificate of Parties in Interest, any recorded ZLDA is valid under the ZR, and any easement for light and air referred to in the ZLDA is properly recorded. As stated by one commentator "title insurance coverage [for TDR deals], where given, involves some fancy footwork, semantically speaking."[17]

The lack of insurability of TDRs without deeds is another reason easements for light and air were often included in TDR transactions in the past. The easement was considered to be an insurable real property interest, giving the TDR purchaser an opportunity to insure the zoning lot merger.[18]

Now, the DOF's policy of requiring a tax lot subdivision prior to the recording of an airspace deed has led many title companies involved in TDR deals to refuse to offer any sort of title insurance in TDR transactions not including the creation and subdivision of an airspace parcel. Thus, while it is possible that the DOF may still allow the recording of the documentation necessary to effect a zoning lot merger without requiring a tax lot subdivision (so long as none of the documents are to be recorded against a "partial" lot), parties desiring to proceed with such transactions may have to do so without the benefit of any title insurance. Lenders are likely to refuse to finance development projects where TDR title insurance is unavailable.

Conclusion

In light of the new DOF policies, practitioners seeking to complete TDR transactions are well advised to consult with their clients early in the process regarding the costs and benefits of the TDR deal structures now available, and advise their clients of the timing considerations, tax and title insurance implications of obtaining a tax lot subdivision and airspace deed.

1. See e.g., New York State Dept. of Taxation and Finance Advisory Opinion, Petition No. M970214C, 1997 NY Tax LEXIS 284 (May 21, 1997).
2. See Alan J. Pomerantz, "Are Air Space Parcels Real Property? Maybe," New York Law Journal, Sept. 26, 1994.
3. NYC Dept. of Finance, Office of the City Register, Memorandum, Recording Air Rights (July 14, 2008). The memorandum provides that exceptions to the policy may be made "depending on the circumstances...up to the discretion of the City Register and/or the Deputy of the [applicable] borough office...".
4. The DOF adopted a policy in 2005 prohibiting recording of documents against partial lots in most cases. Deals involving TDRs were one of many exceptions to this rule.
5. TDR transactions involving landmark sites or special zoning subdistricts created for such purposes do not involve zoning lot mergers and instead are accomplished by certification by the City Planning Commission or special permit. See ZR §§74-79 et seq.; see also ZR §§81-63, 81-744, 91-64 and 94-01. See generally Marc A. Landis, Kevin B. McGrath and Lonica L. Smith, "Transferring Development Rights In New York City," NYLJ, Sept. 29, 2008, Trends in Real Estate & Title Insurance special section.
6. Forms of these required documents were drafted by the DOB and are contained in a DOB Memorandum dated May 18, 1978. With some minor variations, they remain the standard today.
7. See NYC Admin. Code §§27-732 and 27-745.
8. The ZR defines FAR as "the total floor area on a zoning lot, divided by the lot area of the zoning lot." ZR §12-10.
9. *Wing Ming Properties v. Mott Operating Corp.*, 79 NY2d 1021 (1992).
10. See e.g., *Butler v. Frontier Telephone Company*, 186 NY 486, 491 (1906) ("space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil...").
11. N.Y. Real Prop. Law §2(1); N.Y. RPAPL §111.
12. See e.g., New York State Office of Real Property Services, Opinions of Counsel, Volume 8: SBEA No. 110, May 2, 1986; Alan J. Pomerantz, "Are Air Space Parcels Real Property? Maybe," supra; cf. Model Airspace Act §§2 and 4 (1973) (declaring that airspace is real property and that all laws that are applicable to real property shall be applicable to airspace). The Model Airspace Act has not been adopted in New York.
13. NYC Admin. Code §§11-2101–11-2116; NY Tax Law §§1400–1421.
14. See New York State Office of Real Property Services, Opinions of Counsel, Volume 8: SBEA No. 110 (May 2, 1986).
15. See "Real Estate Titles," §22.13 Taxation of Airspace and Air Rights (3d ed.) (New York State Bar Association, 2001).
16. See e.g., *3775 Genesee Street Inc., v. State of New York*, 415 NYS2d 575 (Ct. of Claims, 1979) (holding that the claimant had failed to show that the airspace claimed to have been taken had any intrinsic value of its own, separate from the land, and roundly rejecting the claimant's use of an appraisal based on valuation of land in cubic, rather than square, feet).
17. "Real Estate Titles," supra, §22.12 New York City Zoning Lot Mergers (3d ed.)
18. Id.; see also Marc Israel and Caroline G. Harris, "Higher and Higher," NYLJ, Jan. 16, 2007.

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Exhibit 7

- Underwriting Manual
- Air Space And Air Rights.

Underwriting Manual

1.48 Air Space And Air Rights.

- Download .pdf
- Download .doc

- **1.48.1**
  In General
- **1.48.2**
  Methods Of Conveying, Transferring, Or Severing Air Rights From The Surface Area
- **1.48.3**
  Title Held By The Seller Or Transferor Of Air Space Or Air Rights
- **1.48.4**
  Special Title Insurance Considerations Regarding Air Space
- **1.48.5**
  Title Insurance Of Air Space

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1.48.1

In General

Every piece of real estate has three separate and distinct physical elements: the subsurface, the surface, and the air space. The owner of the land acquires title to the land in conjunction with title to the underground space and the space above it.

Air rights mean the estate, title, interest and rights in the open space or vertical area above ground level. Any ownership of land includes the ownership of air rights, which are subject to reasonable aircraft interference.

The air itself is not real property; airspace, however, is real property when described in three dimensions with reference to a specific parcel of land. Such air rights are alienable. They can be sold, purchased, mortgaged, leased, or otherwise encumbered, subject to. easements of light and air.

Examples of the possible alienation of air rights are a condominium unit, which involves the ownership of a certain specified layer of air space, and an aviation easement, which is the right granted to aircraft, generally when approaching an airport, to fly at a stipulated altitude over certain specific land.

1.48.2

Methods Of Conveying, Transferring, Or Severing Air Rights From The Surface Area

The following are the most common methods:

- A lease of air rights above a fixed plane, together with the air and ground necessary for the foundations of and access to the airspace structure.
- An aerial easement. This method is generally used in the construction of elevated highways.
- By purchase of the fee of ground and air space with reservation of easement by the grantor.
- By purchase of the fee of air space plus easement for support and access.
- By purchase of the fee of air space and purchase of fee of support parcels.
- By purchase of the fee in condominiums.

1.48.3

Title Held By The Seller Or Transferor Of Air Space Or Air Rights

- Fee title;
- Leasehold;
- Easement;
- Determinable fee.

1.48.4

Special Title Insurance Considerations Regarding Air Space

Insurable legal description

Drafting requires the expertise of an engineer. An air space description is always extremely difficult and complicated to draft. Only local experts should attempt such a task. Any air space description must also encompass the tracts describing the easements of support and access.

- Verify that relevant state law recognizes the property interest in the air space description to be real property.
- Verify that the property interest in the air space, as described, is an estate recordable under applicable recording acts.
- Ascertain and comply with all special recording requirements.
- Determine whether the Model Air Space Act been enacted in the state where the land is located.
- Are there specific means of support?
- Are there specific means of access? Access can be achieved through any of the following property interest:
    - A fee;
    - An easement;
    - A leasehold;
    - A license; or,
    - Any combination thereof.
- Note that any access through a leasehold estate is dependent upon the life and termination date of the leasehold.
- Note that any access through an easement would be dependent on any limitation on the easement.
- Note that any access through a license would be dependent on the conditions of the license.
- Review and list mortgages, easements, restrictions, and other liens and encumbrances affecting the subjacent parcel prior to its division.

- Review leases affecting the subjacent parcel prior to its division.
- List mechanic's liens based upon work done or materials furnished to the subjacent parcel prior to its division.
- Compliance with zoning regulations.
- Compliance with subdivision acts.
- Do statutes contain any provision for separate taxation of an air parcel?
- If the air space is over a railroad, does the railroad own the fee title?
- If the air space is over a street or highway, who owns the fee title?
- If the air space is over a navigable body of water, who owns the fee title?

1.48.5

Title Insurance Of Air Space

Insuring title to air space separated from the title to the soil is an extrahazardous risk.

If the air space is part of a condominium unit, please review the section on Condominiums.

In any other case in which the estate to be insured is a space above the surface of the property, specific approval must be obtained from the National Legal Department before issuing any title commitment or title policy.

Exhibit 8

MIAMI TODAY

Air rights sales soaring

Written by **Lidia Dinkova** on December 3, 2014

Air rights – the undeveloped air space above one- and two-story buildings – have been a hot commodity this year in Miami.

So far there have been 18 air rights sales, according to City of Miami records. That's more than the 10 air rights transactions last year and much, much more than the single – and first – air right transaction in Miami in 2011.

Air rights sales are often referred to as the transfer of developmental rights (TDRs) since they are exactly that – the owner of a shorter building sells the unused square footage above his property to a developer of a high-rise building.

The transfer of air rights is nothing new. The City of Sunny Isles Beach, dotted by high-rise condominiums and hotels along Collins Avenue, has long had a much- utilized TDR program.

“In the Northeast corridor up in New York City, TDRs are valuable personal realty and personal right and asset,” said Neil Rollnick, partner with the law firm Hinshaw & Culbertson.

The City of Miami fashioned its own air rights program that supporters say is advantageous for sellers and buyers.

According to the Miami 21 zoning code, qualifying sellers are owners of buildings in Miami that are either designated as historic or are within a historically designated district. The revenue from the air rights sale is then to be put back into renovating and maintaining the historic character of the building.

Think of the MiMo district, where one- and two-story hotels built in the Miami Modernist architecture style had been neglected for years. Drive along the Biscayne Boulevard stretch from about 50th to 79th streets now and see the work being done to renovate the South Pacific, Royal and the Stephens hotels among others, all at least partly funded from TDR revenues. Renovation preserving the historic character of the Vagabond Hotel is finished.

“These are buildings that would sometimes be demolished. The Vagabond was on the demolition list,” said Avra Jain, who is founder of the Vagabond Group and is behind the TDRs and renovations of much of MiMo.

“It’s a great program,” she said. “It maintains the soul and fabric of what is authentically Miami.... The South Pacific, we will turn that into office suites restoring the neon signs, MiMo color palette, the same commitment we made to all the properties we think that are part of the charm of MiMo; these old vintage hotels, these old vintage signs and these 1950s details that make Biscayne Boulevard a destination.”

Ms. Jain, who was the first to deal with air rights in Miami, said she has so far sold more than a million square feet of air rights.

Among her buyers is New York City-based Property Markets Group (PMG), which bought about 140,000 square feet, allowing it to increase its square footage by the same amount for its Echo Brickell residential tower to rise in 2017.

“It just allows for more square footage in the building,” said Ryan Shear, principal at PMG.

“Air rights allow developers to add floor area,” said Javier Aviñó, partner at Bilzin Sumberg’s Land Development and Government Relations Group. “You’ve got your base floor area that you are allowed to build on a property. Let’s say the city code says it’s a million square feet. But you could have a 50% bonus if you do one of the delineated things under the [Miami 21] code to obtain that additional square footage.”

The purchase of air rights is one of those “delineated things under the code.”

“Typically, most developers want to maximize the development potential of a site, so they’re always looking at the maximum and not necessarily the base” square footage, Mr. Aviñó said.

To maximize square footage, developers could also contribute to the city’s trust fund or buy TDRs from the city, he said.

Yet, PMG and other firms tend to prefer buying TDRs from private developers like Ms. Jain – “purely because it was economical,” Mr. Shear said.

Indeed, the cost of air rights sold by a private entity ranges between $8 and $9 per square foot, lower than the cost of air rights sold by the city for $15 to $16 per square foot, Mr. Aviñó said.

“The city’s range, if you are in a more expensive area, then the price per square foot would vary [more] than if you are in another area of the city,” he said. “The private purchase is completely free range and up to the parties.... Obviously, for the private holder of developmental rights, they need to make themselves marketable. If they are at a point as high as where the city is at, they become less desirable.”

While developments like Echo Brickell benefit by maximizing the allowed square footage, that doesn’t mean the overall developed square footage allowed in the City of Miami has increased.

“The property owner who is selling has to put up a covenant that restricts them, that acknowledges, ‘Hey, I sold my development rights to another site,’” Mr. Aviñó said. “All you are doing is transferring floor area from one place to another. But the aggregate is still the same amount.”

Exhibit 9

FAA Approves Skyrise Height Increase To 1,049 Feet

By **TNM Staff** on February 24, 2016

The FAA granted approval yesterday for SkyRise Miami to be built at a height of 1,049 feet above sea level.

SkyRise was approved in 2008 for a height of 1,000 feet above sea level, at a time when the FAA had stricter height limits. Under newly eased height restrictions, towers in Miami have recently been approved at 1,049 feet above sea level.

The SkyRise site sits at just four feet above sea level, so the tower can rise 1,045 feet above ground – the tallest in Miami. Nearby, PMG was approved for a condo tower that is 1,041 feet above ground at 300 Biscayne.

Exhibit 10

THE REAL DEAL
NEW YORK CITY REAL ESTATE NEWS

Tibor Hollo wants to build taller Panorama Tower

As currently planned, Panorama will be 83 stories and 822 feet tall

March 17, 2016 09:49AM

A rendering of Panorama Tower

Panorama Tower will already be the tallest residential high-rise on the eastern seaboard south of New York, but developer Tibor Hollo wants to take it a little higher.

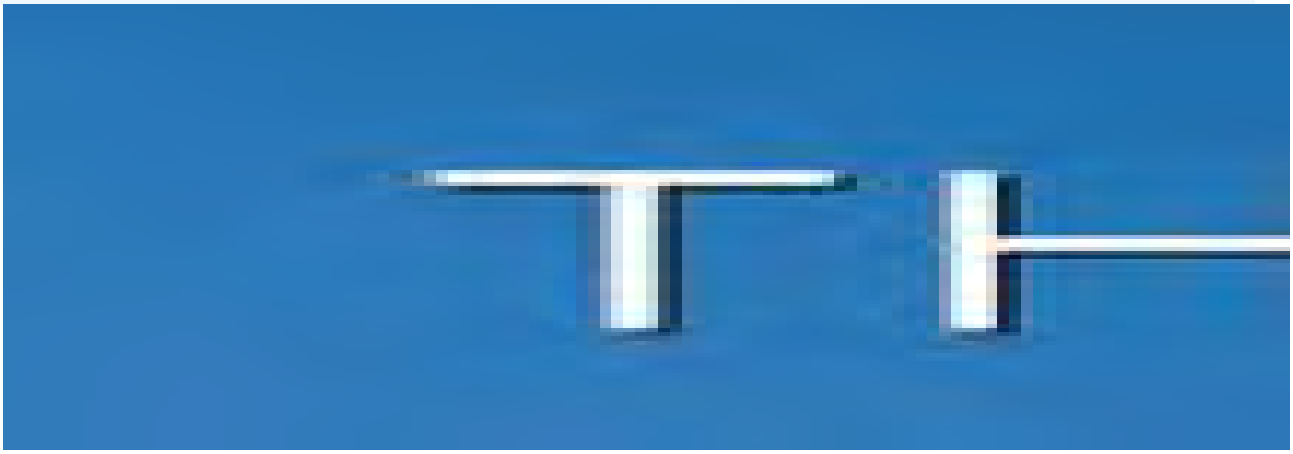
The 83-story, 822-foot tower is already under construction, but Hollo's Florida East Coast Realty filed a request with the Federal Aviation Association to 868 feet above ground, the Next Miami reported. In 2011, the developer requested a height of 843 feet, but the FAA reduced it to its current limit.

In February, the project's general contractor Tutor Perini completed Panorama's 425,000-square-foot, **2,000-car parking garage**. The mixed-use development at 1101 Brickell Avenue also includes 821 apartments, 208 hotel rooms, more than 50,000 square feet of retail and restaurant space, and a 19-story pedestal with more than 100,000 square feet of medical office space and a teaching facility.

Florida East Coast **secured a $340 million construction loan** for the project about a year ago, and Panorama Tower is on track to open in late 2017. Wells Fargo Bank is the lead lender on the construction financing. FECR expects 20 percent of the $800 million project's funding to come from the EB-5 visa program.

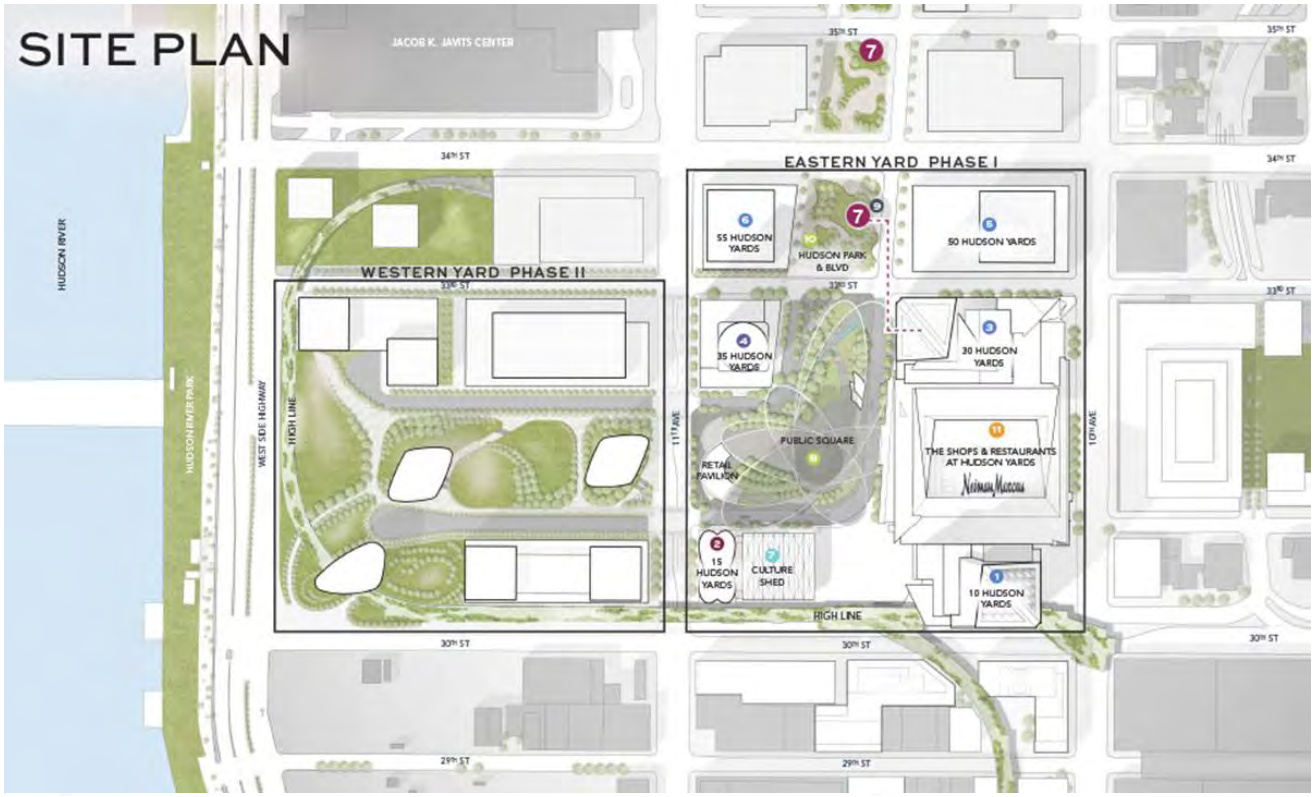
Panorama's exterior was designed by Mosche Cosicher. Zyscovich Architects is handling the interior design. **[The Next Miami]** – *Katherine Kallergis*

Exhibit 11



Residential Inquiries

Hudson Yards is the largest private real estate development in the history of the United States and the largest development in New York City since Rockefeller Center. It is anticipated that more than 24 million people will **visit** Hudson Yards every year. The site will include more than 17 million square feet of commercial and residential space, **state-of-the-art office towers**, **more than 100 shops**, **a collection of restaurants**, **approximately 5,000 residences**, a unique cultural space, **14 acres of public open space**, a 750-seat public school and a 200-room Equinox® branded luxury hotel—all offering **unparalleled amenities** for residents, employees and guests. The **development** of Hudson Yards will create more than 23,000 construction jobs.



PHASE II
WESTERN YARD

From 11th to 12th Avenue between
West 30th and West 33rd Streets

Office	2,000,000 SF
Residential	4,000,000
Retail	100,000
School	120,000
	6,220,000 SF

= 50% OPEN SPACE

PHASE I
EASTERN YARD

From 10th to 11th Avenue between
West 30th and West 34th Streets

10 Hudson Yards	1,800,000 SF
30 Hudson Yards	2,600,000
50 Hudson Yards	2,300,000
55 Hudson Yards	1,300,000
The Shops & Restaurants	1,000,000
Retail Pavillion	50,000
Hotel	220,000
Residential	1,870,000
Culture Shed	200,000
	11,340,000 SF

TOTAL SF: **17,560,000**; TOTAL ACREAGE: **28**

OFFICE | RESIDENTIAL | HOTEL | RETAIL | RESTAURANT | ARTS + CULTURE | TRANSPORTATION

1 10 HUDSON YARDS

1.8M GSF, 895 Ft. tall, 52 stories
Commercial Office, Retail
Kohn Pedersen Fox Associates

COACH L'ORÉAL SAP VAYNERMEDIA BCG Intersection SIDEWALK LABS

2 15 HUDSON YARDS

960,000 GSF, 910 Ft. tall, 70 stories
Residential
Diller Scofidio + Renfro, Rockwell Group

3 30 HUDSON YARDS

2.6M GSF, 1,296 Ft. tall, 90 stories
Commercial Office
Kohn Pedersen Fox Associates

KKR TimeWarner HBO CNN

4 35 HUDSON YARDS

1.1M GSF, 1,000 Ft. tall, 70 stories
Hotel, Residential, Retail, Office,
Fitness Club & Spa
David M. Childs / Skidmore,
Owings & Merrill

5 50 HUDSON YARDS

2.3M GSF, 1,068 Ft. tall, 62 stories
Commercial Office

6 55 HUDSON YARDS

1.3M GSF, 780 Ft. tall, 51 stories
Commercial Office
A. Eugene Kohn / Kevin Roche /
Kohn Pedersen Fox Associates

BOIES, SCHILLER & FLEXNER LLP

7 CULTURE SHED

200,000 GSF, 6 Levels
Diller Scofidio + Renfro, Rockwell Group

8 PUBLIC SQUARE / PLAZA

6.5 Acres
Nelson Byrd Woltz, in partnership
with Heatherwick Studio

9 NO. 7 SUBWAY

10 HUDSON PARK & BLVD

11 THE SHOPS & RESTAURANTS AT HUDSON YARDS

home to Neiman Marcus

1M GSF • 7 levels, Retail, Food & Beverage • Elkus Manfredi Architects

- CONTACT US
- WEBSITE MAP
- PRIVACY POLICY
- LOCATION
- TERMS OF USE
- MEDIA RESOURCES
-

RELATED OXFORD AN OMERS COMPANY

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Exhibit 12

Det Free Press: Sale of air rights in Detroit is a new development opportunity: Space above skyline attracts buyers

Feb 07 2007 01:04:45

By John Gallagher

Feb. 7--Sometimes, the only way to go is up.

The recent announcement that Detroit-based Roxbury Group would build upscale condominiums atop a planned city-owned garage near the Book-Cadillac Hotel has sparked interest in the novel idea of air rights.

Widely sold and traded in New York and other leading cities, air rights have been virtually unknown in Detroit up to now. Air rights can allow developers to build taller buildings than zoning codes normally allow, or, in some cases, allow development to take place above railroad yards, freeways or parking garages.

The use of air rights in Detroit development is in its infancy, but more examples may be on the way, now that Roxbury's project, known as the Griswold, is in the works.

"It is an extremely positive statement about the market," George Jackson, president of the quasi-public Detroit Economic Growth Corp., said Tuesday. "It would not have been financially feasible five to 10 years ago, so to have it happening really is a good sign that the market can bear these types of projects."

Air rights have come into play in three deals downtown in the past year. In two of the cases, developers of the Book-Cadillac and Pick-Ft. Shelby hotel renovation projects donated their air rights -- essentially promising never to build on top of their buildings -- in exchange for tax credits.

In the third, the Roxbury Group is paying the city's Downtown Development Authority for the right to build its condo project on top of DDA's planned garage that will rise next to the Book-Cadillac.

To obtain the DDA's approval, Roxbury agreed to pay the extra cost of reinforcing the garage so it could support the condos on top -- a figure still to be determined but something under $1 million. The Griswold project in total costs about $26 million, so the air rights added less than 5% to the overall cost.

Like any property owner, the DDA had the right to sell its air space as long as it doesn't interfere with air traffic and conforms to normal zoning and building codes.

The deal is being cited as another step toward reviving Detroit's once-moribund central business district. "At least some part of downtown now is starting to function like other major cities do," David Di Rita, a partner in Roxbury, said Tuesday. "It says that the market is maturing and evolving to a potentially high-end value market."

As a sign of how quickly the concept of air rights has taken hold here, even relatively new parking garages built downtown, like the 1001 Woodward and Detroit Opera House garages, both of which opened in the past two years, were built without the reinforcing that would allow future development on top of them.

"We're going to encourage garages to be more than just a garage," Jackson said. "We're asking already for ground floor retail, and I think it makes sense for us now to also have garages that have foundations that allow you to build on top."

In crowded cities like New York and Chicago, air rights have long played an important role in development. In Chicago, the city's new Millennium Park was built using air rights over downtown rail yards.

In New York, height limits on new development have created a brisk market in air rights. Frequently, air rights are sold or traded to preserve historic churches and other landmarks.

In one common scenario in Manhattan, developers buy the air rights to build in the space over, say, a historic church, then transfer those rights to another site nearby, and there build a building higher than normally would be allowed.

In a record-setting deal, in November 2005 the Christ Church on Park Avenue in Manhattan sold the air rights over the church to developers for more than $30 million so a high-rise residential tower could be built not far away.

Contact JOHN GALLAGHER at 313-222-5173 or gallagher@freepress.com. To see more of the Detroit Free Press, or to subscribe to the newspaper, go to http://www.freep.com

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EXHIBIT 13

April, 2015 Volume 89, No. 4

It's Up in the Air: Air Rights in Modern Development

by Martin A. Schwartz

Romans gave us architectural marvels, funny looking numbers, and the concept of property rights in airspace under the doctrine "culus est solum, cius est usque ad coelum" translated as "[to] whomsoever the soil belongs, he owns also to the sky."[1] The doctrine endows a landowner with a private property right in the airspace, upward to an indefinite extent, above the land. It was incorporated into both English and American common law, appearing in Edward Coke's commentaries in the 17th century and William Blackstone's commentaries in the 18th century.[2]

Although this doctrine may have worked well in the age of Robin Hood, the unlimited right of ownership of airspace above private property created a problem with the advent of commercial aviation in the early 20th century. In response, Congress limited the scope of landowners' airspace rights to an upper limit of private ownership in order to allow for air travel. The enactment of the Air Commerce Act of 1926 created a "public right of freedom of transit in air commerce" through the navigable airspace of the United States. Navigable airspace is defined as airspace above the minimum altitudes of flight and is designated a nationally shared common area for modern flight. Generally speaking, the navigable airspace consists of airspace above an elevation of 500 feet from ground level.

Currently, although 49 U.S.C. §40103(1) states that the "United States Government has exclusive sovereignty of air space of the United States," subsection 2 recognizes public use of airspace only above navigable airspace, thereby retaining private ownership below navigable airspace.

Because the statutory limitation on ownership of airspace conflicted with the common law rights in unlimited ownership of airspace, a potential taking issue arose as a result of this early federal legislation. This issue came before the Supreme Court in 1946 in *United States v. Causby*, 328 U.S. 256 (1946). The main issue in this case involved a low flight path of U.S. bombers and other aircraft over plaintiff's property. The flight path and size of the aircraft caused intense noise and vibrations resulting in death to plaintiff's chickens and mental distress to plaintiff. Justice Douglas, however, writing for the Court, stated that the ad coelum doctrine "has no place in the modern world. The air is a public highway, as Congress have declared."[3] The Court noted, however, that landowners still maintain a property interest in the nonnavigable airspace above their land.

The common law doctrine of ownership of airspace has been limited to allow for air travel, but the concept of a landowner's ownership of airspace above the surface of owned land below navigable airspace remains well established. The ownership and use of air rights are significant in today's society in the context of view easements, solar access easements, flight path easements, and development rights in the nonnavigable airspace above an owner's land. It is important to note, however, that while one may own the nonnavigable airspace above one's property, local zoning and land use regulations may make it impossible or expensive to utilize such airspace in development.

Horizontal Subdivision of Airspace

Most development situations involve an integrated ownership of fee interest in the underlying land, the building, and the airspace occupied by the building. However, is it possible to transfer airspace and own airspace separately and apart from the ownership of the surface of the land? Some courts held that one must own underlying surface land in order to own the overlying airspace.[4]

Today, the law is less clear, but separation of ownership appears to rely on statutory authority. Tiffany's textbook on real estate notes:

> Whether the owner of the land, in the ordinary case, actually owns the air space above the land, and whether such air space is susceptible of division into strata for the purpose of separate ownership, is a question of difficulty….[A]s a practical matter, leases or sales of air space for the erection of buildings, signs, etc., are by no means uncommon, especially in the larger cities of this country. However, it has been held that airspace is an integral part of the land below and is not separate property that may be conveyed completely detached from the land. [5]

One of the ways the legislature has permitted separation of ownership in air rights is by the creation of condominiums. Condominium unit ownership illustrates that a single condominium unit owner can hold title to the envelope of airspace occupied by the condominium unit. Condominiums allow the subdivision and transfer of exclusive rights in airspace — rights that are separate from ownership of the surface land below. Under the Florida Condominiums Act, the definition of "land" may include "all or any portion of the airspace…between two legally identifiable elevations" and may exclude the surface of a parcel of real property.[6]

Air rights may be divided into separate units of real property created by the horizontal subdivision of real estate. Accordingly, two or more parties may possess separate ownership interests or rights of control over real property located in different tracts of horizontal airspace over the subjacent land. By dividing the airspace above a parcel of land, it is often possible to stack uses in a mixed-use development owned by more than one owner, in the same way it is possible to subdivide and develop side-by-side a horizontal surface subdivision.

Subdivision Laws

Although the concept that a landowner may horizontally divide and convey his or her property interest in the airspace above the land has been accepted, such conveyances almost always involve retention of a footprint on the surface of the land. It is unclear whether a conveyance of airspace can be totally divorced from surface ownership without legislative enabling.

In any event, a drafter of a project containing an air rights parcel has to make certain that all necessary elements of access to and use of the parcel are built into the structure so that the owner of the air rights parcel will not have to rely on a jet pack for ingress and a parachute for egress. Such factors to consider are elevators, fire stairs, and utility lines, including lines for cable and Internet services. These considerations can be dealt with through a lollipop legal description in which the air rights parcel has tendrils to the surface or by creation of appropriate easements for access and utilities.

Is the vertical subdivision of airspace a subdivision for purposes of platting? Some counties appear to treat it as a subdivision and others do not. Developers try to avoid platting whenever possible in order to avoid delays and reduce costs it may entail, but platting may solve other issues related to the viability of the divided airspace.

Real Estate Tax Issues in Utilizing Air Rights

With the advent of mixed-use projects, developers sought to carve up airspace among various uses and separate ownership. One of the earliest examples in South Florida was the Four Seasons building on Brickell Avenue in Miami. The building contains a hotel, an office component, a spa component, a parking component, all separately owned, and a residential condominium and a hotel condominium with hotel units. The building looks like a single integrated structure when viewed from the outside, but when its legal descriptions are analyzed, it looks more like a

jig-saw puzzle with various interlocking pieces. Given the vertical separation in ownership, the individually owned components should each receive a separate tax folio number. However, while the Miami-Dade tax assessor has issued separate tax folio numbers for the units in the two separate condominiums, the residential and hotel condominiums, the assessor has refused to issue separate tax folio numbers for the remainder of the building, all of which receive only a single tax folio even though each has a separate owner.

The tax appraiser has taken the position that existing legislation requires a separate tax allocation between land and building in a tax parcel. Airspace, without a footprint on the ground, cannot be separately assessed except in the case of condominiums for which statutory authority currently exists.

The separation of tax folios in a mixed-use project can be avoided if only one element in the project is not a condominium unit. Thus, if a project contains a commercial condominium, a residential condominium, and noncondominium retail space, the retail space would receive a separate folio by default. If the noncondominium portion of the building consists of more than one separate element, like in the Four Seasons' building, there is a serious problem.

The absence of separate folios for individual building components makes it difficult, if not impossible, to separately finance the individual components. A legislative fix for projects that subdivide airspace has been proposed and may be enacted in the 2015 session. It is not clear whether other counties in Florida share the same problem.

Transferring Air Rights for Development

Air rights are sometimes critical for proposed development of a parcel because they allow more dense development. In the early 1900s, property owners in New York and Chicago began trading air rights, separating the ownership of defined parcels of airspace from ownership of the surface of the earth. Airspace has become an increasingly valuable resource, especially in urban areas. According to Robert Von Ancken, an air rights expert and appraiser, "[t]he trading of air rights is more prevalent than it's ever been before." Von Ancken estimates that air rights trade for 50 percent to 60 percent of what the earth beneath them would sell for.[7] In New York, the price of air rights has dramatically increased: 20 years ago, $45 a square foot was considered a reasonable fee, but in recent years, the norm in prime neighborhoods has crept toward $450 a square foot.[8] A recent article indicated that some professionals believe that air rights may be worth more than the underlying land.[9] While this may sound ridiculous, it is attributable to the premium a developer may obtain for penthouse units in a taller structure affording more dramatic city views.

The determination of what air interests can be transferred can be a critical issue. Development rights in airspace may be sold or transferred to other parcels of land in two main ways. A zoning lot merger joins two or more adjacent zoning lots into one new zoning lot so that the unused development rights in one lot may be shifted to the other. This may be true even though the individual parcels are separately owned. For example, two adjacent lots may each permit an eight-story structure. But if the improved lot consists of only two stories, the adjacent developable lot may then support a 14-story building.

Alternatively, a transfer of development rights (TDR) allows for the transfer of unused development rights from one zoning lot to another lot that may not be located adjacent to the property. A TDR severs the unused development value from a property (contributing site) and allows the landowner of the contributing site to transfer or sell the development rights to another property known as the receiving site to increase the density of development potential on the receiving site.

Creation of TDRs is often used by governments to restrict development on certain properties while mitigating a regulatory taking claim. In essence, TDRs transform potential development rights into currency for the property owner of the restricted property.

Although the Miami 21 Zoning Code imposes height limits for buildings in the Miami Modern Biscayne Boulevard historic district, the code allows for TDRs.[10] The TDRs enable owners of historic property to sell to developers

whose projects are located in specially designated, high-density zoning areas of Miami, the development rights that they are unable to utilize because of historic designation. In such transactions, the property in the high-density zone obtains a development bonus in the form of greater height or density rights. The revenue from such transfers for the contributing site, which can amount to millions of dollars, can then be used for renovations of the historic property.

As an example, developer Avra Jain sold 440,000 square feet of Vagabond Motel's development rights for $3 million to developers who were able to enlarge the size of their condominium projects in Coconut Grove, Edgewater, and Brickell. She also sold the Royal Motel's 142,868 square feet of air rights to a developer for a 57-story Brickell project. Jain commented that the ability to raise money through a TDR sale "is key to the restoration of the deteriorated boulevard motels, whose small size and big renovation needs would otherwise make the job financially unfeasible."[11] TDRs also appeal to condominium developers because they have been able to purchase them for $7-9 per square foot, considerably cheaper than the cost of buying additional development capacity through the city's Miami 21 bonus' program, which also permits builders to purchase the right to add volume to their projects at about $17 per square foot.[12]

Municipalities can also create additional sources of income by the sale of air rights over public rights of ways and public land. Swire Properties, in developing Brickell City Center in downtown Miami, paid millions of dollars to build over streets to connect properties on both sides of the street. The failure to collect payments on another massive project in Miami has generated controversy.[13]

Sunny Isles Beach allows the purchase of TDRs from a municipal site or a private site. It also allows banking TDRs following purchase so there may be no connection to the contributing site. TDRs can then be traded as currency or sold to a development site.

Each municipality has its own rules regarding TDRs and transferring air rights so that each municipality's code needs to be examined to the extent air rights are sought for development.

Conclusion

Air rights are significant in 21st century development, but we are still somewhat tethered to the ancient Roman construct tying air rights to ownership of the surface of property. Permitting transfers of air space without a surface component might promote more ingenious developmental structures. It appears, however, that further development in this area will be reliant on a legislatively developed framework since most courts have been reluctant to sever ownership of air space from the underlying property.

[1] Troy Rule, *Airspace and the Takings Clause*, 90 Wash. U. L. Rev. 421 (2012).

[2] Troy Rule, *Airspace in the Green Economy*, 59 UCLA L. Rev. 270, 283 (2011).

[3] *Causby*, 328 U.S. at 261.

[4] Troy Rule, *Airspace in the Green Economy*, 59 UCLA L. Rev. 270 (2011).

[5] Tiffany Real Property §583 (2011).

[6] *See* Fla. Stat. §718.103(18) ("'Land' means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface. However, if so defined in the declaration, the term 'land' may mean all or any portion of the airspace or subterranean space between two legally identifiable elevations and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit.").

[7] Robin Finn, *The Great Air Race*, The New York Times, February 22, 2013.

[8] *Id*.

[9] Kaitlin Ugolik, *Developers Reach Deep for Rights to Build Sky-High,* Law 360 (Sept. 24, 2014).

[10] Erik Bojnansky, *Rebuilding the Boulevard*, Biscayne Times, March 2014.

[11] Andres Viglucci, *Kitschy, Cool Vagabond Motel Coming Back to Life on Biscayne Boulevard's MiMo District*, Miami Herald, November 3, 2013.

[12] Carolina Bolado, *Historic Sites Cash In as Miami Real Estate Takes Off*, Law 360 (Dec. 1, 2014).

[13] Eleazar David Melendez, Daily Business Review, September 26, 2014.

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The completed DFS CE Card must be submitted at the conclusion of Fund Assembly. **CARDS THAT ARE MAILED OR OTHERWISE DELIVERED TO THE FUND AFTER SATURDAY, MAY 7TH WILL NOT BE PROCESSED!**

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Name of Course:
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SAMPLE

Approved DFS presentations:

All segments listed below must be attended (no partial credit possible)

Thursday, May 5, 2016
- Claims Skits
- Title Teasers

Friday, May 6, 2016

Breakouts
- In-depth Claims Topics (see chart on back)
- Sovereignty Lands (see chart on back)
- Bankruptcy (see chart on back)

General Sessions
- Quiz on Recent Real Property Cases
- Survival of the Small Company: A Practical Guide to Pillar 3 Compliance - Ethical Considerations for Protecting Non-Public Private Information (ETHICS CREDIT)
- Demystifying the Title Policy - Coverage & Exclusions

Saturday, May 7, 2016
(No Credit is Approved for the Commercial Real Estate Track)

Residential Track
- Creative Solutions to Frequently-encountered Title Issues
- CFPB Practice Tips Panel

Credits: 9 CE 4-10 Title/CE 9906 Ethics 1

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Friday, May 6 - Breakout Sessions/Salons

CAUTION: You must follow either Track 1 or Track 2 in order to attend all three required presentations.

Track 1. 8:50 am In- Depth Claims Topics in Salons IV – IX; 9:55 am How To Address Sovereignty Land Issues In Florida (Advanced Level) X – XII; and 11:00 am Bankruptcy (Advanced Level) in Salons I – III.

Track 2. 8:50 am Bankruptcy in Salons I – III; 9:55 am In-Depth Claims Topic in Salons I - III; and 11:00 How To Address Sovereignty Land Issues In Florida (Advanced Level) X – XII.

	Hilton Bonnet Creek Salons I - III	**Hilton Bonnet Creek Salons IV – IX**	**Hilton Bonnet Creek Salons X – XII**	**Dixie Meeting Room** (Lower Level)
SESSION ONE 8:50am–9:40am	Bankruptcy (Advanced Level)	In-Depth Claims Topics	Marketing and the Unlawful Inducement Rule	New Member Q & A
9:40am–9:55am	Refreshment Break at the Expo and Tech Center			
SESSION TWO 9:55am–10:45am	In-Depth Claims Topics	Advising Real Estate Licensees on Malpractice & Licensure	How To Address Sovereignty Land Issues In Florida (Advanced Level)	
10:45am–11:00am	Refreshment Break at the Expo and Tech Center			
SESSION THREE 11:00am–11:50am	Bankruptcy (Advanced Level)	Marketing and the Unlawful Inducement Rule	How To Address Sovereignty Land Issues In Florida (Advanced Level)	New Member Q & A

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Title: 52nd Annual Fund Assembly

Date: May 5, 6 and 7, 2016

Location: Hilton Bonnet Creek Hotel

Approval is awarded for the above described program. Language advising this program has met the requirements of the Certifying Board for Legal Assistants may appear on promotional literature describing this program.

Maximum number of hours/credits.
14.5 Hours ___ Credits: Including 2.0 hours Ethics

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Session Hours	Session Topics (Description and Speakers)	Validation of Session Attendance (Signature of speaker or seminar official)
14.5 hours Including 2.0 hours Ethics	Refer to attached program for the 52nd Annual Fund Assembly	CM

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